121—488

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~722~~. 413 156

TIERY WRIGHT, PLAINTIFF IN ERROR,

vs.

B. H. ROSEBERRY, FLEMMING GUITTAR, PERMELIA SIMMONS, AND SARAH POWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 12, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 722.

TIERY WRIGHT, PLAINTIFF IN ERROR,

vs.

B. H. ROSEBERRY, FLEMMING GUITTAR, PERMELIA SIMMONS, AND SARAH POWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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a In the Supreme Court of the State of California.

TIERY WRIGHT, Appellant,
vs.
B. H. ROSEBERRY *et al.*, Respondents. } No. ——.

Transcript on appeal, from superior court, Yolo county.

W. B. Treadwell and C. P. Sprague, for appellant; W. C. Belcher and J. C. Ball, for respondents.

1 *Complaint.*

In the Supreme Court of the State of California.

In the District Court of the 6th Judicial District, County of Yolo, State of California.

TIERY WRIGHT, Plaintiff,
vs.
B. H. ROSEBERRY, FLEMMING GUITTAR, PERMELIA SIMMONS, and SARAH POWELL, Defendants. } No. ——.

The complaint of the above-named plaintiff respectfully shows to this honorable court that on the 23d day of July, 1866, plaintiff was seized in fee and possessed of and entitled to the possession of a certain tract of land situated in said Yolo county, State of
2 California, and embracing the following described divisions and subdivisions as made by the United States survey, to wit: The north half of the southeast quarter, and the southeast quarter of the southeast quarter of section twenty-four (24), the east half of the northeast quarter and the southwest quarter of the northeast quarter of section twenty-five (25), the southeast quarter of section twenty-five (25), and the northeast quarter of section thirty-six (36), all in township eleven (11) north, range two (2) east, Mount Diablo base and meridian, and containing five hundred and sixty acres of land.

That plaintiff now is the owner of said real estate in fee and entitled to the possession of the same.

That while plaintiff was so seized and entitled to the possession of said real estate, land, and premises the said defendants did, before the commencement of this suit, to wit, on or about the first of January, 1870, unlawfully and without right or title enter into and upon the same and oust the plaintiff therefrom, and did wrongfully withhold and ever since that time have withheld and still withhold the possession thereof from the plaintiff, to his wrong and injury and damage in the sum of one thousand dollars.

And plaintiff further shows that the rents and profits of the said land and premises is of the value of five hundred and sixty dollars per year, and that by reason of the unlawful holding of said premises by said defendants plaintiff has been damaged by being deprived of the use and occupation of said premises in the sum of five hundred and sixty dollars, and by a continuance thereof will be damaged at the rate of five hundred and sixty dollars per annum.

Wherefore plaintiff demands judgment against said defendants for the restitution of said land and premises, for the sum of one thousand dollars for the ouster and withholding thereof, and
3 for five hundred and sixty dollars per annum for the rents and profits, and for costs and expenses of suit.

C. P. SPRAGUE,
Attorney for Plaintiff.

Endorsed: Filed December 9th, 1870. E. Bynum, clerk, by J. L. Simpson, deputy.

Amended Answer of Roseberry and Guittar.

(Title of Court and Cause.)

Now come B. H. Roseberry and Fleming Guittar, two of the above-named defendants, and by leave of the court first had and obtained, for themselves and not for their co-defendants, answering the complaint of the plaintiff on file in said action, deny each and every allegation in said complaint contained.

And, further answering, these defendants aver that the defendant, B. H. Roseberry, was at the time of the commencement of this action, and is now, the owner and seized in fee of all those certain pieces or parcels of land situate in said Yolo county, described as the southeast quarter of section twenty-five (25), and the northeast quarter of section thirty-six (36), in township eleven (11) north, of range two (2) east, Mount Diablo base and meridian, and that the same is parcel of the lands described in plaintiff's complaint, and that the defendant Guittar is in the actual possession of the said land as the tenant of said defendant Roseberry, but claims no right, title, or interest in or to said land otherwise than as such tenant.

And, further answering, and as a further defense to said action, these defendants aver that neither the plaintiff, his ancestor, predecessor, or grantor, was or ever were seized or possessed of the
4 lands in this answer particularly described, or any part or parcel thereof, within five years, or within ten years next before the commencement of this action, but that, on the contrary, the defendant Roseberry and his grantors have, for more than five years, and for more than ten years next preceding the commencement of this action, held and enjoyed the actual, peaceable, exclusive, and adverse possession of the said lands, and every part and parcel thereof, and that plaintiff's cause and right of action, if any he ever had, for the recovery of the possession of said land, or any part or parcel thereof, was at the time of the commencement of this action, and is now, barred by the provisions of the act of the Legislature of this State entitled "An act defining the time for commencing civil actions," passed April 22d, 1850, and the acts amendatory thereof and supplemental thereto. Wherefore these defendants pray judgment that plaintiff take nothing as against them, or either of them, by reason of his said action, and for their costs.

COFFORTH & SPAULDING AND
BELCHER & BELCHER,
Attorneys for Defendants, Roseberry and Guittar.

Endorsed: Filed May 23d, 1871. E. Bynum, clerk, by J. L. Simpson, deputy.

Amended Answer of Sarah Powell.

(Title of Court and Cause.)

Now comes Sarah Powell, one of the defendants in the above-entitled action, and by leave of the court first had and obtained, separately and for herself answering the complaint of the plaintiff on file in said action, denies each and every allegation in said complaint contained.

5 And, further answering, this defendant avers and shows that at the time of the commencement of this action she was, ever since has been, and now is, the owner, and then had, and how has, the possession of all those certain pieces or parcels of land situate in said Yolo county, and particularly described in the complaint as the north half of the southeast quarter and the southeast quarter of the southeast quarter of section twenty-four (24), in township eleven (11) north, of range two (2) east, Mount Diablo base and meridian.

And, further answering, and for a further defense to said action, this defendant further avers that neither the plaintiff, his ancestor, predecessor, or grantor, was or were seized or possessed of the lands hereinbefore particularly described, or any part or parcel thereof, within five years, or within ten years next before the commencement of this action, and that, on the contrary, this defendant and those through whom she claims have for more than five years, and more than ten years next prior to the commencement of this action, held and enjoyed the actual, peaceable, continuous, exclusive, and adverse possession of the said land, and every part and parcel thereof, and that plaintiff's cause and right of action, if any he ever had for the recovery of the possession of the said land, and every part and parcel thereof, was at the time of the commencement of this action, and is now, barred by the provisions of the act of the Legislature of this State entitled "An act to define the time for commencing civil actions," passed April 22d, 1850, and the acts amendatory thereof and supplemental thereto. Wherefore, the premises considered, this defendant prays judgment that plaintiff take nothing by reason of his said action as against her, and for her costs.

COFFORTH & SPAULDING AND
BELCHER & BELCHER,
Attorneys for Defendant, Sarah Powell.

6 Endorsed: Filed May 23d, 1871. E. Bynum, clerk, by J. L. Simpson, deputy.

Amended Answer of Pernelia Simmons.

(Title of Court and Cause.)

Now comes Pernelia Simmons, one of the defendants above named, and, by leave of the court first had and obtained, separately and for

herself answering the complaint of the plaintiff on file in said action, denies each and every allegation in said complaint contained.

And, further answering, and as a further defense to said action, this defendant avers that at the time of the commencement of this action she was, ever since has been, and now is, the owner and in the possession of all those certain pieces or parcels of land situate in said Yolo county which are particularly described in the complaint herein as the east half of the northeast quarter and the southwest quarter of the northeast quarter of section twenty-five (25), in township eleven (11) north, range two (2) east, Mount Diablo base and meridian.

And, further answering, and as a further defense to said action, this defendant avers that neither the plaintiff, his ancestors, predecessor, or grantor, was or were seized or possessed of the lands hereinbefore particularly described, or any part or parcel thereof, within five years, or within ten years next before the commencement of this action, and that, on the contrary, this defendant, and those through whom she claims, have for more than five years, and for more than ten years next prior to the commencement of this action, held and enjoyed the actual, peaceable, exclusive, continuous, and adverse possession of the said lands, and every part and parcel thereof, and that plaintiff's cause and right of action for the recovery
7 of the possession of the said lands, if any such cause or right of action he ever had, was at the time of the commencement of this action, and is now, barred by the provisions of the act of the Legislature of this State entitled "An act to define the time for commencing civil actions," passed April 22d, 1850, and the acts amendatory thereof and supplemental thereto.

Wherefore this defendant prays judgment that plaintiff take nothing as against her by reason of his said action, and for her costs.

COFFORTH & SPAULDING AND
BELCHER & BELCHER,
Attorneys for Defendant, Permelia Simmons.

Endorsed: Filed May 23d, 1871. E. Bynum, clerk, by J. L. Simpson, deputy.

Original Decision.

(Title of Court and Cause.)

1. From the pleading and evidence in this cause I find the following facts: At the time of the commencement of this suit the defendant Roseberry was in possession of the northeast quarter of section thirty-six, and the southeast quarter of section twenty-five; the defendant Simmons was in possession of the east half of the northeast quarter of section twenty-five, and the defendant Powell was in possession of the east half and northwest quarter of the southeast quarter of section twenty-four of the lands in suit, and none of the defendants were in possession of any other portion of the lands in suit than herein specified.

2. The plaintiff is the holder and owner of two certificates of pur-

chase, regularly issued by the State of California on the 1st day of July, A. D. 1862, covering all the lands in suit and other land,
8 and describing the same as swamp and overflowed lands granted to the State by act of Congress of September 28th, 1850. Plaintiff has no other or further title, and has never been in possession of any of said land sued for, nor were his assignors ever in possession.

3. The annual rental value of said lands is twenty-five cents per acre.

4. In the year 1864 the said lands were surveyed and sectionized in the field by the authority of the United States, which survey and the plat thereof were approved by the United States surveyor general for California on the 10th day of January, A. D. 1866, by which survey and plat the east half of the northeast quarter of said section twenty-five was designated as swamp and overflowed land, and as such segregated from the high land, and all the other lands in suit were by said plat and survey designated as high or arable, and not swamp lands.

5. In the year 1862 Amos Mathews, being at the time county surveyor of Yolo county, made a survey of a large body of land in Yolo county, including the lands in suit, and made a map or plat thereof, upon which plat he designated what he supposed to be swamp and overflowed land, and left said map or plat in the surveyor general's office, where it remained without authentication, filing, or approval until the year 1872, when Mathews indorsed thereon an affidavit, stating in substance that the law of 1861 had been complied with by him in the matter of making and returning said survey and plat, and then a copy of said plat and affidavit was certified by the State surveyor general to the U. S. surveyor general for California, and filed in his office "between the 22d day of March and the 4th of April, 1872."

6. On the 2d day of September, A. D. 1864, one George Bolin filed a declaratory statement in the proper U. S. land office at
9 Marysville, California, for the northeast quarter of section thirty-six, hereinbefore described, and the United States Government, on the 20th day of February, A. D. 1868, issued to said George Bolin a patent for said northeast quarter of section thirty-six, and on the first day of January, A. D. 1871, Bolin conveyed said land by deed to B. H. Roseberry.

7. On the 23d day of August, A. D. 1864, one Silas George Simmons filed a declaratory statement in the U. S. land office at Marysville, California, claiming a pre-emption right upon the east half of the northeast quarter of section twenty-five, above mentioned, and alleging settlement in the year 1857, after which he, said Simmons, died, and his wife, defendant here, was duly appointed administratrix of his estate, and she, as such administratrix, completed and perfected the entry under said declaratory statement of her husband on the 6th of September, A. D. 1869, and in pursuance thereof obtained a patent from the United States Government on the 29th day of July, A. D. 1871, to the heirs of the said Silas George Simmons for the said east half of northeast quarter of section twenty-five.

In the year 1857 the said Simmons enclosed a part of this tract, and he and his heirs have ever since then claimed and used the same.

8. On the 11th day of July, 1864, Josiah Lippincott filed in the U. S. land office at Marysville, California, a declaratory statement of a pre-emption right upon the east half and northwest quarter of southeast quarter of section twenty-four, above mentioned. On the 8th of August, A. D. 1865, the said Lippincott died, leaving a surviving wife, Sarah A., who prosecuted said pre-emption claim, so that on the 1st day of November, 1867, the United States Government issued its patent for said lands to the heirs of the said Lippincott. Mrs. Powell, the defendant here, was the surviving
10 wife of Lippincott. Lippincott, deceased, in the fall of 1871 enclosed a portion of this tract of land with a fraction of land adjoining it on the east, upon which he built his house; which enclosure and house he continued to occupy and use until he died, and since his death his widow continued the use and occupation of the land, and erected a new dwelling-house, in which she lived, on this tract of land.

9. For some years prior to 1862 one Mrs. Posse lived upon the southeast quarter of said section twenty-five, in a house on the northern part thereof, and had a fence enclosing some 15 or 20 acres which she usually cultivated. In or about the year 1862 Mrs. Posse died, and H. B. Wood was appointed her administrator. In February, A. D. 1864, the said administrator sold and conveyed said quarter section of land, as part of Mrs. Posse's estate, to defendant Roseberry. The said administrator's deed sufficiently described the land, but such sale was not in all respects conducted according to law, the sale, petition for confirmation, and decree of confirmation having all occurred on the same day. Roseberry entered under such purchase, but before the deed was made, and has ever since remained in possession of said land and lived thereon. On the —— day of ——, A. D. 1864, the said Roseberry filed a declaratory statement of his pre-emption claim in the U. S. land office at Marysville, and on the 15th day of June, A. D. 1866, procured from the United States a patent for said southeast quarter of section twenty-five.

10. In the year 1864 defendant Roseberry enclosed the said southeast quarter of section twenty-five by a substantial fence, which he has maintained ever since, and has continuously used and occupied said quarter section of land, and has cultivated a considerable portion thereof annually, and has maintained an open, notorious, adverse, and exclusive possession thereof.

11 11. The south half of the northeast quarter of section thirty-six, in suit, containing eighty acres; the northeast quarter of the northeast quarter of section twenty-five, containing forty acres, and the northwest quarter of the southeast quarter of section twenty-four, containing forty acres, were on the 28th day of September, A. D. 1850, swamp and overflowed lands within the meaning of the act of Congress of that date, and as such were granted to this State, but none of the other lands in suit were swamp or overflowed lands

within the meaning of said act, but were arable lands susceptible of cultivation without reclamation.

And I therefore conclude that at the time of the commencement of this suit the plaintiff was the owner and entitled to the possession of the south half of the northeast quarter of section thirty-six, in suit, which was unlawfully withheld from him by defendant Roseberry; and of the east half of the northeast quarter of section twenty-five, (containing 80 acres), which was withheld by defendant Simmons; and of the northwest quarter of the southeast quarter of section twenty-four, which was withheld from him by defendant Powell; and that plaintiff is damaged by defendant Roseberry in the sum of $150, by defendant Simmons in the sum of $150, and by defendant Powell in the sum of $75.

And as conclusions of law I find and decide:

First. That plaintiff is entitled to judgment against the defendant Roseberry for the restitution of the south half of the northeast quarter of section thirty-six, in suit, and $150 damages; and against defendant Simmons for the restitution of the east half of the northeast quarter of section twenty-five, in suit, and $150 damages; and against the defendant Powell for the restitution of the northwest quarter of the southeast quarter of section twenty-four, and $75 damages.

12 Second. That plaintiff is entitled to judgment against all of said defendants for his costs, to be apportioned equally between them; and

Third. That plaintiff's prayer for any other or further relief should be denied.

Let judgment be entered accordingly.

S. C. DENSON,
District Judge.

Endorsed: Filed Sept. 8th, 1876. D. M. Burns, clerk, by D. Schindler, deputy.

Second Judgment.

(Title of Court and Cause.)

This cause came on regularly for trial on the — day of ——, 1879, in pursuance of the remittitur of the supreme court, W. B. Treadwell and C. P. Sprague, Esqs., appearing for plaintiff, and W. C. Belcher and J. C. Ball, Esqs., appearing for defendants; whereupon, after hearing the evidence and the argument of counsel, the cause was taken under advisement by the court.

And now, on this 13th day of December, 1879, the court, being well advised in the premises, files its findings of fact and conclusions of law, and orders judgment to be entered accordingly.

Wherefore, by reason of law and the finding aforesaid, it is ordered, adjudged, and decreed that the plaintiff, Tiery Wright, take nothing by this suit, and that the defendants, B. H. Roseberry, Sarah A. Powell, and Permelia Simmons, do have and recover of and from

said plaintiff their costs of suit in this behalf expended, taxed at $——.

Dec. 13th, 1879.

D. M. BURNS, *Clerk.*

Printed on the cover in red ink: Error. See page 66.

13 *Notice of Motion for New Trial.*

(Title of Court and Cause.)

To the defendants in the above entitled action, and Messrs. W. C. Belcher, Coffroth and Spaulding, and J. C. Ball, their attorneys:

You will please take notice that the above-named plaintiff intends to move the court to vacate its decision herein, filed on the 13th day of December, 1879, and to grant a new trial herein, on the following grounds, to wit:

First. Insufficiency of the evidence to justify said decision.

Second. That said decision is against law.

Third. Errors in law occurring at the trial of said cause, and excepted to by plaintiff.

Said motion will be made upon a bill of exceptions to be hereafter prepared and settled.

C. P. SPRAGUE AND
W. B. TREADWELL,
Att'ys for Plaintiff.

Endorsed: Filed Dec. 22d, 1879. D. M. Burns, clerk, by Ignacio Brown, deputy.

Original Judgment.

(Title of Court and Cause.)

The above-entitled cause was tried by the court on the 23d day of May, 1876, a jury trial having been expressly waived by both parties. C. P. Sprague, W. B. Treadwell, and J. T. Carey appeared for the plaintiff, and W. C. Belcher and J. C. and C. Ball for the defendants; whereupon witnesses were examined on behalf of plaintiff and defendants, and, after argument by the respective counsel, the cause was submitted and taken by the court under advisement. And now,

14 on this 8th day of September, 1876, the court, being well advised in the premises, files its findings of fact and conclusions of law, and orders judgment to be entered accordingly.

Wherefore, by reason of law and the findings aforesaid, it is ordered, adjudged, and decreed that the plaintiff, Tiery Wright, do have and recover of and from the defendant, B. H. Roseberry, the possession of the south half of the northeast quarter of section thirty-six, in township eleven north, range two east, Mount Diablo meridian, together with the sum of $150 damages for the detention thereof; that the plaintiff, Tiery Wright, do have and recover of and from the defendant, Permelia Simmons, the possession of the east half of the

northeast quarter of section twenty-five, in township eleven north, range two east, Mount Diablo meridian, together with the sum of $150 damages for the detention thereof; and that the plaintiff, Tiery Wright, do have and recover of and from the defendant, Sarah A. Powell, the possession of the northwest quarter of the southeast quarter of section twenty-four, in township eleven north, range two east, Mount Diablo meridian, together with the sum of $75 damages for the detention thereof. It is further ordered, adjudged, and decreed that the plaintiff, Tiery Wright, do have and recover of and from the defendants, B. H. Roseberry, Permelia Simmons, and Sarah A. Powell, his costs of suit, taxed at $604.60, the same to be apportioned equally between said defendants. And it is further ordered, adjudged, and decreed that as to the north half of the northeast quarter of section thirty-six, the southeast quarter of section twenty-five, and the east half of the southeast quarter of section twenty-four, all in township eleven north, range two east, Mount Diablo meridian, the plaintiff, Tiery Wright, do take nothing by his suit.

Sept. 8th, 1876.

D. M. BURNS, *Clerk.*

15 *Remittitur of Supreme Court.*

(Title of Court and Cause.)

And now at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court.

It appearing that the court below has failed to find upon material issues made by the pleadings, to wit: Whether or not the plaintiff is the owner or entitled to the possession of the north half of the northeast quarter of section thirty-six, the southeast quarter of section twenty-five, and the east half of the southeast quarter of section twenty-four of the lands in suit:

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the sixth judicial district in and for the county of Yolo in the above-entitled cause be, and the same is hereby, reversed and the cause remanded, with directions to the court below to find upon the foregoing issues from the evidence already taken and such further evidence as may be adduced by the respective parties, and thereupon to render judgment upon the whole case, the respective appellants in said actions severally to recover costs on the appeal.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 20th day of December, A. D. 1877, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at office, this 25th day of January, A. D. 1878.

[SEAL.]

D. B. WOOLF, *Clerk,*
By H. P. BUSH, *Deputy.*

16 *Second Decision.*

(Title of Court and Cause.)

All findings of fact heretofore made in this case are vacated and set aside, and the facts of the case are now found to be as follows:

I.

The plaintiff is not now and never was the owner, nor entitled to the possession of, all or any part of the lands described in his complaint herein, and all and singular the allegations of said complaint are untrue.

II.

Neither the said defendants, nor any nor either of them, ever at any time unlawfully or without right entered upon the aforesaid land, or any part thereof, and none of them have ever ousted the plaintiff from the whole or any part thereof, and none of said defendants have ever wrongfully withheld the whole or any part of said lands from the plaintiff, and none of them have injured him in any sum whatever.

III.

The rents and profits of the said lands in suit are of the value of $560 per year, but the plaintiff has not been damaged by any act of the defendants, or either of them, in any sum whatever.

IV.

All and singular the allegations of the amended answers of the defendants, Roseberry and Guittar, of the defendant Simmons, and of the defendant Powell are true, as stated therein, respectively.

And I conclude the law to be that the defendants are entitled to judgment, denying the prayer of plaintiff's complaint, and dismissing his action, with costs in favor of defendants.

17 Let judgment be so entered.

S. C. DENSON,
District Judge.

Endorsed: Filed Dec. 13th, 1879. D. M. Burns, clerk, by Ignacio Brown, deputy.

Bill of Exceptions.

(Title of Court and Cause.)

The following are the exceptions taken by plaintiff on the trial of said cause, and to the decision therein, with so much of the evidence as is necessary to explain the points relied on:

Said cause came on regularly for trial before the district court of the sixth judicial district of the State of California, in and for the said county of Yolo, on the 30th day of March, 1876, when the following proceedings were had:

Plaintiff introduced in evidence certificate of purchase No. 1659 from the State of California to J. W. Tuttle for swamp land survey No. 588, being the southeast quarter and south half of northeast

quarter of section twenty-four, and the east half of section twenty-five, all in township eleven north, range two east, Mount Diablo meridian, in which certificate said lands are described as swamp and overflowed lands granted by the United States to the State of California by the act of Congress of September 28th, 1850. Said certificate bears date July 1st, 1862, and was duly assigned to plaintiff on the 14th day of January, 1864.

Plaintiff then introduced in evidence certificate of purchase No. 1660 from the State of California to W. H. Alvis for swamp land survey No. 592, being the east half and southwest quarter of section thirty-six and the southeast quarter of section thirty-five, all
18 in township eleven north, range two east, Mount Diablo meridian, in which certificate said lands are described as swamp and overflowed lands granted by the United States to the State of California by the act of Congress of September 28th, 1850. Said certificate bears date July 1st, 1862, and was duly assigned to plaintiff on the 10th day of July, 1862.

Plaintiff then introduced in evidence a duly certified copy of the plat of the township in which the lands in controversy are situated, approved by L. Upson, United States surveyor general for California, on the 10th day of January, 1866, on which plat the east half of the northeast quarter of said section twenty-five was designated as swamp and overflowed land, but none other of the lands in controversy were so designated. Said plat showed upon its face that the survey of said township had been made in the field in the year 1864.

Plaintiff then introduced in evidence the plat of said township, approved by J. R. Hardenbergh, United States surveyor general for California, on the 4th day of April, 1872, on which map all the lands in controversy are designated as swamp and overflowed lands.

Upon the said plat is endorsed the following certificate:

The above map of township number eleven north, of range number two east, of Mount Diablo meridian, represents the amendments made to the map of this township, approved January 10th, 1866, in strict conformity—

First. With the segregation of swamp and overflowed land made by the State of California east and north of Sacramento river, as shown on plat of swamp and overflowed lands in the counties of Sutter and Placer, approved November 15th, 1861, by H. A. Higley, surveyor general and *ex-officio* register State land office; and

Second. With the segregation of swamp and overflowed land south and west of Sacramento river, as the same was sworn to have been made by Amos Mathews, county surveyor of Yolo county, in August, 1862, in accordance with the laws of the State of
19 California, and as the same is represented on said Mathews' plat.

The certified copies of both plats filed by the State of California in this office show that the two segregations conform to the system of surveys adopted by the United States.

U. S. surveyor general's office, San Francisco, Cal., April 4th, 1872.

J. R. HARDENBERGH,
U. S. Surveyor General, California.

The copy of said map had endorsed upon it the following certificate:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CALIFORNIA.

I, James T. Stratton, surveyor general of the United States for California, hereby certify that this is a correct copy of the original plat on file in this office, and a correct copy of the certificate of the surveyor general endorsed thereon, and the whole thereof. And I further certify that said certificate is, in substance, the certificate of approval on all township plats made and approved in pursuance of section four of the act of Congress approved July 23d, 1866, entitled "An act to quiet land titles in the State of California."

Attest my hand and the seal of this office this 20th day of November, A. D. 1875.

[SEAL.] JAS. T. STRATTON,
U. S. Surveyor General, California.

Plaintiff then introduced in evidence a copy, duly certified by Robert Gardner, surveyor general of the State of California, of a map and Overflowed Land in Yolo County, segregated by Amos Mathews, on file in said office entitled "Supplement Segregation of Swamp county surveyor," on which plat all of the lands in controversy are designated as swamp and overflowed lands.

Plaintiff then introduced in evidence a copy of a duly certified copy of said segregation map, on which copy, so introduced, is endorsed the following certificate:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CALIFORNIA.

20 I hereby certify that this diagram has been compared with the original by me, and that the same is a correct transcript of a plat embracing townships eleven north, range two east; twelve north, two east; twelve north, one east (fractional), and eleven north, one east, Mount Diablo meridian, said plat having been filed in this office between the 22d of March and 4th of April, 1872, and being plat of survey made by the county surveyor of Yolo county, under and in pursuance of the statutes of the State of California then in force, and showing the segregation lines of the swamp and overflowed land in said townships; and further, that the whole of that portion of said plat is designated thereon as swamp and overflowed land; that I have compared the certificate of approval of said plat with the original endorsed thereon, and that the same is a full, true, and correct transcript thereof.

Witness my hand and the seal of this office this 22d day of September, A. D. 1873.

[SEAL.] J. R. HARDENBERGH,
U. S. Surveyor General, California.

Plaintiff then introduced in evidence a duly certified copy of the following letter, transmitted by J. F. Houghton, surveyor general and *ex-officio* register of the State land office, to L. B. Ayer, register

of the United States land office at Marysville, California, on the 15th day of June, 1867, together with the list of lands annexed thereto and referred to therein, which list included all the lands in controversy:

STATE OF CALIFORNIA, OFFICE OF SURVEYOR GENERAL
AND REGISTER OF THE STATE LAND OFFICE,
SACRAMENTO, *June 15th*, 1867.

To L. B. AYER,
Register U. S. Land Office for the Marysville Land District:

I hereby notify you that all the lands described in the annexed list had prior to the 23d day of July, A. D. 1866, been selected and disposed of to purchasers in good faith by the State of California, under her laws, as swamp and overflowed lands.

[SEAL.] J. F. HOUGHTON,
Surveyor General and Register.

21 Plaintiff then introduced in evidence a duly certified copy of the certificate of survey of J. W. Tuttle for swamp land survey No. 588, filed in the surveyor-general's office Oct. 7th, 1861, and approved Nov. 2d, 1861, and upon which said certificate of purchase No. 1659 was issued. Said certificate of survey was in due form, and had annexed thereto the affidavits prescribed by law.

Plaintiff then introduced in evidence a duly certified copy of the certificate of survey of W. H. Alvis for swamp land survey No. 592, filed in the surveyor general's office Oct. 7th, 1861, and approved Nov. 2d, 1861, and upon which said certificate of purchase No. 1660 was issued. Said certificate of survey was in due form, and had annexed thereto the affidavits prescribed by law.

E. TWITCHELL was then sworn as a witness for plaintiff, and testified as follows: "I am a clerk in the State land office. I was employed in the surveyor general's office first in February, 1858, and remained there until 1863. I was then absent until December, 1867, when I came back, and have been employed in one or other of those offices ever since. In the winter of 1862, or the spring of 1863, I am not certain which, Amos Mathews, the county surveyor of Yolo county, filed in the surveyor general's office the map called 'Supplemental Segregation of Swamp and Overflowed Land in Yolo county, segregated by Amos Mathews, county surveyor.' I saw him bring the map there and deposit it in the office. This is the map." (Here the witness exhibited the map, being the map of which certified copies had theretofore been introduced in evidence, but which map contained no endorsement of filing.)

Plaintiff then asked the witness the following question: "Since that time has it or has it not been recognized as the segregation map of Yolo county by the surveyor general of this State, and
22 acted upon by him as such, and by the land officers as such; by the surveyor general and register of the State land office as such?

Counsel for the defendants objected to the question, on the ground that the same was immaterial, irrelevant, and incompetent, and the court sustained the objection; to which ruling the plaintiff, by his counsel, then and there duly excepted.

The witness, resuming, then testified as follows: "This map has remained among the archives of that office ever since. No other segregation map of these lands was ever in the office. There was another map, called the original segregation map, made by Wm. Manis, a former county surveyor, which did not embrace these lands, for the reason that they were then supposed to be included in a platted Mexican grant, and were, therefore, not segregated."

Plaintiff then introduced said map in evidence.

Plaintiff then introduced in evidence duly certified copies of the following letters of instruction from the General Land Department of the United States to the U. S. surveyor general for California:

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, *Sept. 13th*, 1866.

L. UPSON, Esq., *United States Surveyor General, San Francisco, California.*

SIR: The object of the following is specially to direct your attention to the swamp land interest of the State of California under the grant of September 28th, 1850, and the special legislation found in the act herewith, approved July 23d, 1866, to quiet land titles in the State of California.

It is obviously the intention of Congress in this act of 1866 to reach all lands claimed or which may hereafter be claimed
23 under the original grant of 1850. These lands may be classed as follows:

First. Selections made by California under surveys made by her authority where the State had sold tracts to individuals in good faith in townships where the United States surveys also had been made at the passage of said act.

Second. Selections made by the State and sold as aforesaid in townships where no United States surveys had been made at the date of the act.

Third. Lands in townships surveyed, or which may hereafter be surveyed, by the United States, and plats thereof approved, which may be represented on said plats as swamp and overflowed.

Fourth. Lands falling within segregation lines of the State surveys, where the same conform to the system of United States surveys.

Fifth. Lands in townships yet to be surveyed by the United States.

Sixth. Lands claimed by the State as swamp, but which may not be so represented in the United States surveys.

Seventh. Bodies of land notoriously swamp, which cannot be practically subdivided.

This classification will be observed in the instructions hereinafter communicated.

To the confirmation of any lands mentioned in the first and second class and referred to in section one of the act the following are declared—

Exceptions: All tracts on which any rights may have attached under the homestead, pre-emption, or other law of the United States; all tracts reserved for naval, military, or Indian purposes; all mineral lands; lands held or claimed under any valid Mexican or Spanish grant; lands which at the passage of the act were included within the limits of any city, town, or village, or within the county of San Francisco.

Class first. You are instructed to forward to this office, after
24 the same shall have been carefully revised by the proper district land officer, lists of all tracts which California may have claimed as swamp, and which the State in good faith may have sold to private individuals, when the same do not fall within the exceptions hereinbefore mentioned.

The fact of selections and sale by the State must be established by proof which you shall adjudge satisfactory, and the register and receiver must be required to note and immediately report any conflict, should such in any case exist.

If the tracts of this class claimed by the State should not conform to the United States system of surveys, they must be designated by numbers as "swamp lots," to enable this office to describe them with professional accuracy and precision in the patents.

These lots, as soon as practicable, should be marked upon the approved township plats, according to the system in practice in designating surveyed private claims, and copies of such plat should be sent to this office.

It will be necessary for you to examine and adopt the State surveys of lands of this class, such surveys being within the confirmatory provisions of the second section of this act.

Second class. Surveys are required to be made by the United States as an indispensable preliminary to your report of selections under this second class. (See sec. 3 of the act.)

Purchasers under the State will then have the right of showing by satisfactory testimony their purchase and claims within the time allowed to pre-emptors, to wit, one year after the filing of the approved plat with the district land officers. If the purchase from the State as swamp is satisfactorily established, and no interference is reported, the tract should be listed as swamp land; so in like manner, if upon survey by the United States selections of this class are found
25 not to conform to such United States surveys, the selections resting on State survey must be so adjusted as to make them conform with the General Government surveys, embracing as near as possible the original tracts claimed.

Third class. You will examine forthwith those plats on which segregation surveys appear, and report in regular list form all tracts not otherwise interfered with, which from said plats may be represented as swamp, and continue to report whenever new surveys may hereafter be made.

Fourth class. In compliance with a clause in the fourth section of this act, you are instructed to examine the State surveys and segregation maps in connection with the public surveys, and where they

conform you will promptly list and report the tracts therein represented to be swamp, where no interferences exist.

Fifth class. In townships where no segregation surveys have been made by the United States, this office by said act is authorized to direct you, and you are accordingly instructed, to cause the same to be made within one year after application by the Governor of the State. When said survey is completed in any township you will report in proper form the lands designated as swamp.

Sixth class. Where the State may claim lands as swamp not shown to be such by your plats, nor included in the lines of segregation, you will, after due notice to all interested, take testimony relative to the true character at the date of the swamp grant of the lands of this class. After fully considering this testimony you will decide as to the right of the State to the lands in question, subject to the approval of the Commissioner, and transmit each case, properly numbered, with the papers pertaining thereto, to this office for final action.

26 Seventh class. Bodies of land notoriously swamp, and which for that reason cannot be easily subdivided, may be reported according to the exterior lines which mark out and distinctly designate them, but care should always be taken to have those lines properly connected with the system of United States surveys, and avoid as far as possible any irregular tracts or subdivisions.

Lands of the third and fourth classes must be promptly acted upon, and lists thereof should be immediately sent to this office for definitive action, as there is nothing required but a simple examination of segregation lines according to the several township plats.

Where testimony is to be taken either by the surveyor general or the local officers, a reasonable period must necessarily elapse before your final report of the result of such investigation can be reached; yet it is urged upon you, in view of the long delay in the adjustment of swamp land interests in California, that every effort consistent with security to the interests of all concerned shall be put forth to bring this work to an early conclusion.

Should any questions arise in the administering of this law not settled in these instructions, you will forthwith report the same, and prompt attention and reply will be given.

In reporting list of selections you will please observe in the arrangement and description of them the foregoing classification.

In each and all cases you are desired to append your certificates of authentication as to the character of the claims and on the questions of confirmation by the act aforesaid.

The receipt of these instructions you are requested to acknowledge.

Very respectfully, etc.,

JOS. S. WILSON, *Commissioner.*

27 Endorsed: Received with Commissioner Willis Drummond's letter of July 7, 1871.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *August 8th*, 1871.

JAMES R. HARDENBURGH,
United States Surveyor General, San Francisco, California:

SIR: Referring again to my letter of the 7th ultimo in relation to the examination of the segregation maps and surveys of swamp and overflowed land made by the State of California, and the construction of township plats by you in accordance with the provisions of the fourth section of the act of Congress July 23d, 1866, entitled "An act to quiet land titles in California," I will say that inasmuch as a question has been raised as to the proper construction and interpretation of that part of said section which reads as follows: "The commissioner shall direct the surveyor general of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly," I have deemed it best to submit the question to the Honorable Secretary of the Interior.

The agent of the State claims that unless valid adverse rights had attached prior to July 23d, 1866, it is absolutely entitled to all the lands embraced within its segregation surveys, where they conform to the ordinary rectangular system of surveys adopted by the United States, and that you cannot, in the examination of the segregation maps and surveys made by the State and the construction of township plats, take into consideration the character of the lands; but that your examination is solely for the purpose of determining whether such segregation surveys agree with the rectangular system of surveys adopted by the United States; and that in all
28 cases where you find such agreement, you must construct and approve township plats, and that the lands must be listed to the State, regardless of quality or character, and whether they are shown to be swamp and overflowed or not by the United States surveys. On the other hand it is contended that the swampy character of the land must not only be established by both surveys, but that there must be an exact agreement of segregation lines made by the State and the United States, in order to authorize you to construct and return township plats, or to entitle the State to have the lands listed and approved.

The controversy involves so much that, as before stated, I have concluded to refer the question to the Honorable Secretary of the Interior, and secure his opinion and decision; but as it is conceded that the State is entitled to all lands segregated by it prior to July 23d, 1866, which have been found to be and returned as swamp and overflowed by the United States surveyors where the lines of the two surveys agree, you will proceed to make the examination directed by my letter of the seventh ultimo, and to construct and return to this office township plats, showing all lands where there is such agreement between the United States and the State surveys, both as to lines and the swampy character of the lands; but in

cases where there is an agreement in the lines of surveys, but disagreement or want of conformity as to the quality and character of the lands—that is to say, where the State has segregated lands as swamp and overflowed, and the United States surveyors have returned them as dry, or have omitted to report their quality, but have found the lines of the segregation survey to conform to the United States survey—you will neither report them as swamp or dry lands, but defer action until the Honorable Secretary has decided whether the State is entitled to them or not. If the Secre-
29 tary shall decide that the State has a right to lands thus passed by you in making your first plats and returns, they can be reported on supplemental plats.

As the reference of this question is merely a precautionary measure for the purpose of protecting the Government in a matter about which there is a difference of opinion and a doubt as to what the State is entitled to, and it is not intended to delay or hinder the State in securing a perfect title to lands to which it has a clear and unquestionable right; but to facilitate the adjustment of such claims as far as may be in the power of this office, you will proceed with the work of examining the State segregation maps and surveys and construction of township plats as promptly and expeditiously as possible.

I am, sir, very respectfully, your obedient servant,

WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF JUSTICE,
OFFICE OF ASSISTANT ATTORNEY GENERAL,
WASHINGTON, *Dec. 5th*, 1871.

SIR: I have considered the subject submitted for my opinion and relating to the proper answers to be given to the inquiries made by the Commissioner of the General Land Office in his letter of August 16th, 1871. The letter states the case plainly, and is as follows:

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *August 16th*, 1871.

Hon. COLUMBUS DELANO,
Secretary of the Interior.

SIR: A question has been raised as to the meaning and proper construction of that part of the forth section of "An act to quiet land titles in California," approved July 23d, 1866 (U. S. Statutes, vol. 14, page 219), which provides: "The Commissioner shall direct the surveyor general for the State of California to examine the
30 segregation maps and surveys of the swamp and overflowed lands made by said State, and when he shall find them to conform to the system of surveys adopted by the United States he shall construct and approve township maps accordingly, and forward to the General Land Office for approval."

The agent of the State claims that unless valid adverse rights had attached prior to July 23d, 1866, it is absolutely entitled to all the

lands embraced within its segregation surveys, where they conform to the ordinary rectangular system of surveys adopted by the United States, and that the surveyor general cannot, in the examination of the segregation maps and surveys made by the State and the construction of township plats, take into consideration the character of the lands, but that his examination is solely for the purpose of determining whether such segregation surveys agree with the rectangular system of surveys adopted by the United States, and that in all cases where he finds such agreement he must construct and approve township plats, and that the lands must be listed to the State regardless of quality or character, and whether they are shown to be swamp and overflowed or not by the United States surveys.

On the other hand, it is contended by Senator Stewart, of Nevada, who was in the Senate at the time of the passage of the act of July 23d, 1866, and others, that the swampy character of the land must not only be established by both surveys, but that there must be an exact agreement of segregation lines made by the State and the United States, in order to authorize the surveyor general to construct and return township plats, or to entitle the State to have the lands listed and approved.

The magnitude of the interests involved makes it desirable that the proceedings of the surveyor general in the examination of the segregation maps and surveys of the State, and the construction of township plats, and of this office in approving lists of swamp lands to the State of California, should be strictly legal, and I therefore respectfully submit the following questions for your consideration, and request an advisory opinion or decision thereon at as early a date as practicable:

First. Do the words "system of surveys adopted by the United States," as used in the foregoing quotation from section four, act of July 23d, 1866, refer to or mean the ordinary rectangular system of surveys adopted by the United States, and embodied in a work published by the General Land Office entitled a "Manual of Surveying Instructions," and made a part of each contract for surveying by the second section of an act of Congress, approved May 30th, 1862, entitled "An act to reduce the expenses of the survey and sale of the public lands of the United States?" (U. S. Statutes, vol. 12, page 409.)

31

Second. If such words refer to such rectangular system of surveys, are the lands segregated by the State of California prior to July 23d, 1866, where the surveys conform to such system, confirmed to the State of California by said act of July 23d, 1866?

Third. If the lands embraced within such segregation surveys are so confirmed, can the surveyor general, in the examination of the segregation maps and surveys of the State and the construction of township plats, take into consideration the quality of the lands embraced in the segregation surveys, and exclude from his township plats lands which have been, in his opinion, incorrectly or improperly segregated as swamp or overflowed by the State of California?

I have the honor to be, very respectfully, your obedient servant,

WILLIS DRUMMOND,
Commissioner.

The questions propounded require an examination of the act referred to. It is entitled "An act to quiet land titles in California," and is remedial in its character. To interpret it properly it will be necessary to examine the evil which it was intended to remedy.

It is well known that prior (to) its passage there was very great confusion and uncertainty in regard to land titles in that State. Congress had made to it school, school indemnity, university, internal improvements, and swamp land grants. The Mexican Government, before the treaty of Guadalupe Hidalgo, had made many grants to private individuals. The State had made selections under her grants. In many cases these selections were against law, and the lands selected were disposed of by the State. For example, the law required that school indemnity and university grants
32 should be approved by the Secretary of the Interior before they became valid, and yet the State had made selections and disposed of them without such approval.

The swamp land grant gave to the State only such wet and overflowed land as had been surveyed, and yet the State had made selections and sales of swamp lands that had never been surveyed. It had selected as swamp lands which the United States authorities claimed were not swamp, and that were, in fact, dry.

In 1861 it passed a law creating a board of commissioners to select the lands claimed to be swamp, and cause them to be surveyed into sections and parts of sections, and make maps of the same, one of which was to be forwarded to the Land Office in Washington. It did make the selections and maps, and did forward them to Washington. It had in some cases authorized surveys of lands claimed to be swamp under the geodetic system of survey, a system unknown to the United States laws, and, when referred to at all, referred to as what is known as the "geodetic method." (Secs. 4, 10 Stat., 245.)

Some townships had been surveyed by the United States, others had not. None of the United States surveys made and approved prior to July 23d, 1866, divided the swamp land into legal subdivisions, or gave them specific areas. They merely indicated them in bulk.

Of private land claims some were in litigation, others were rejected by the courts. When rejected, what should be done with the lands claimed?

Should they be treated as public lands, and open to pre-emption and to homestead entries to all, or should the private land claimants be allowed, in any case, to enter them; and, if so, in what?

These and like matters were involved in uncertainty. This
33 was acknowledged by all parties, State and National. Governor Low, in his message to the Legislature of December 4th, 1865, said: "In the almost inextricable state of confusion to which our land matters have been brought, the settlement of these points of difference between the United States and the State, so as to secure to California and the people who have purchased lands of her their just rights, does not seem clear. * * * Our only remedy lies in future legislation by Congress, to validate what is now invalid in the sales already made, and settle all conflicting opinions regarding the

rights of the State, under the various acts of Congress, making donations of land."

The Hon. J. M. Edmunds, Commissioner of the General Land Office, in his letter to the chairman of the Senate Committee on Public Lands, transmitting the bill afterward passed, and now under consideration, said: "As the bill now stands, this office, after thorough examination of its provisions, and impressed with the absolute necessity of enactment of some measure in order to relieve the State and our people from the insufferable evils of uncertainty of titles, has no hesitation in recommending, and accordingly recommends, its passage."

Under this state of facts the act of July 23d, 1866, was passed for the purpose of removing uncertainty and quieting land titles in California.

Congress had long before, and in 1796, adopted a system of surveying the public lands. (1 Stat., 466.) This system provided that they should be "divided by north and south lines, run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of the late Indian purchase, of tracts of land heretofore surveyed or patented, or the course of navigable rivers may render it impracti-
cable; then this rule shall be departed from no further than
34 such particular circumstances may require. The corners of the townships shall be marked with progressive numbers from the beginning; each distance of a mile between the said corners shall be also distinctly marked with marks different from those of the corners. One-half of said townships, taking them alternately, shall be subdivided into sections containing, as nearly as may be, six hundred and forty acres each, by running through the same, each way, parallel lines at the end of every two miles, and by making a corner on each of said lines at the end of every mile. The sections shall be numbered, respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers, till the thirty-sixth be completed," etc.

The system thus prescribed was incorporated into a manual called a "Manual of Surveying Instructions," and was required to be made a part of every contract for surveying public lands by the second section of the act of May 30th, 1862. (12 Stat., 409.)

With this preliminary statement of fact and of law I proceed to consider the act in question.

Counsel for the parties have filed able and very elaborate arguments maintaining their respective views as to its meaning.

They differ widely in their construction of it. I have given attention to their arguments, and have arrived at conclusions which are satisfactory to my own mind.

In stating them I shall not confine myself strictly to answering the questions propounded by the Commissioner. The first inquiry that naturally arises is, What rule of interpretation is applicable to this act?

Is it a remedial statute, and therefore to be construed "largely and

beneficially," or is it a statute making a legislative grant, and
35 therefore to be construed strictly, and in cases of doubt as to what was intended to be so construed as to restrict and limit the grant, rather than to extend it?

In my opinion it is a remedial statute, intended to help out defects and difficulties in grants already made, and should be construed liberally, and so as to accomplish the end had in view, that of settling and quieting land titles in California. (Dwarris, 632; Sedg. Stat. and Const. Law, 359; Tracy *v.* Cord, 2 Ohio Stat., 431; Gillett & Moody, 3 Com'r, 479; State *v.* Jones, 8 Maryland, 88; Mayor *v.* Lord, 17 Wend., 285.)

The first section provides "that in all cases where the State of California has made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State: Provided, That no selection made by said State contrary to existing laws shall be confirmed by this act for lands to which any adverse pre-emption, homestead, or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States," etc.

There is no controversy as to the first clause of this section. It is conceded by all parties to confirm all selections of public lands made under any Congressional grant, where the lands thus selected have been sold or disposed of under State laws to *bona-fide* purchasers, no matter whether the selections were regular or irregular, authorized or unauthorized by law.

There is, however, a controversy to the proviso. The State claimed that it is not only applicable to cases of selections of lands which have been sold to *bona-fide* purchasers, but also to the second clause of the fourth section, which requires the Commissioner to "direct
36 the United States surveyor general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State, and when he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward them to the General Land Office for approval."

The other parties claim that the proviso does not apply to this portion of said fourth section.

I am of opinion that it does apply. The proviso so states. It says that "no selection made by said State contrary to existing laws shall be confirmed by this act to which any adverse pre-emption," etc., has attached.

If it had been the intention to limit it to the cases stated in the first section, it would have used apt words limiting it to that section. (See proviso at the end of the eighth section.) The debates show that this was the construction that the law-makers gave to the language used.

Mr. Hendricks (Congressional Globe, part 4, p. 3080, Thirty-ninth Congress, first session) said: "I certainly could not vote to confirm a title irregularly obtained through the State of California, as

against a rightful settler, but I think the proviso of the first section sufficiently protects that class of persons, and that was the opinion of the committee. It was unfortunate that the State of California established a surveying system of her own; very unfortunate that she sold certificates to be located by the purchaser at his election in any part of the State. But it has become a part of the history of the lands of that State, and we must relieve the embarrassment with regard to their titles."

Mr. CONNESS: "I desire to say that it may go upon the record that I would not vote to confirm to the State of California, or to any of her people, an acre of land which was settled on by a man
37 who had undertaken to make his home there."

The second section relates by its terms to selections named in the first section which had been made upon land surveyed by authority of the United States, and provides that the State authorities, where it had not been already done, should notify the register of the United States land office for the district where the land is located of "such selection," which notice should be regarded as the date of the State selection. It required the Commissioner of the General Land Office immediately to instruct the several local registers to forward to that office, after investigation and decision, "all such selections;" and if the Commissioner found them such as were described in the first section, he was required to certify them over to the State in the usual manner.

The selections, and the only selections referred to in this section, are those made and disposed of by the State under her laws to *bona fide* purchasers.

If they had not been disposed of by the State to *bona fide* purchasers, they were not to be reported to the registers nor investigated or decided by them.

The third section provides that where "selection named in section one of this act" has been made from lands which had not been surveyed by authority of the United States, but which selection had been surveyed by authority of and under the laws of California, and the lands sold to purchasers in good faith under the laws of the State, that such selections should, after the date of the passage of this act, when marked off and designated in the field, have the same force and effect as the pre-emption right of a settler upon unsurveyed public lands; and if upon survey of such land by the United States "the lines of the two surveys shall be found" not to agree, the
38 selection shall be so changed as to include those legal subdivisions which nearest conform to the identical land included in the State survey and selections.

It further provided that the holder of such State title on land not surveyed by the United States should have such time (one year) to prove up his purchase and claim after the township plat of the United States survey had been filed with the register as was allowed to pre-emptors under existing laws, and if such selection were found by the Commissioner of the General Land Office to be in accordance with said section one he was required to certify it over to the State.

It will be observed that each and all of these three sections relate

to such selections as are described in the first section, and that it is to those where the lands have been disposed of to purchasers in good faith under State laws, and to no other selections whatever.

The fourth section is the first one that treats of selections or claims which have not been disposed of under State laws to *bona fide* purchasers.

This section introduces new subjects, and is the one about which there is great controversy. It may very properly be divided into three classes.

First. "That in all cases where township surveys have been made or shall hereafter be made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California as swamp and overflowed all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats."

This gives to the State all lands that are represented as swamp on the approved United States surveys and plats that have been made or shall thereafter be made, and requires the Commissioner to certify them over to the State.

Second. "The Commissioner shall direct the United States surveyor general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States he shall construct and approve township plats accordingly, and forward to the General Land Office for approval: Provided, That in segregating large bodies of land notoriously and obviously swamp and overflowed it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land. In case such State surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the Commissioner shall direct the surveyor general to make segregation surveys, upon application to said surveyor general by the Governor of said State, within one year of such application, of all the swamp and overflowed lands in such townships, and to report the same to the General Land Office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain."

The first inquiry that arises upon this clause is: What is the true meaning of the phrase "system of surveys adopted by the United States"? Does it mean, as claimed by some of the counsel, such surveys as the surveyor general shall find to conform to "his own surveys"—such surveys as shall exactly agree in segregation lines with the United States surveys—or such surveys as conform to the rectangular system of surveys, which, as we have heretofore seen, had been prescribed by the United States statutes?

There were in California at the time of the passage of this act two systems of surveying, both of which were in certain cases authorized by her legislation.

The one system was the geodetic, which made use of such irregular lines and angles as were necessary to survey tracts that were irregular in their boundaries.

The other was the rectangular system, which required the tracts to be surveyed into legal subdivisions of sections and parts of sections, and all the angles to be right angles. One of these systems was unknown to the United States laws. The other was the system prescribed by them. Both had been more or less used by the State in segregating swamp lands claimed by her. Upon this state of fact is there any reasonable ground to doubt what Congress meant by "the system of surveys adopted by the United States?" In my opinion it meant the rectangular system, and intended to require the United States surveyor general for the State of California to examine the State maps and surveys of swamp lands, and when he found them to conform to the rectangular system of surveys adopted by the United States he was directed to construct and approve township maps accordingly.

The object of the statute was to make an end of controversy, and to accomplish that result it became necessary to fix upon some rule that should be final. What rule that should be was the subject of legislative discretion. In the exercise of that discretion Congress determined that the fact of conformity to the rectangular system should be the test.

It may have come to this conclusion from the fact that the State surveys were the only ones that sectionized the swamp lands, and therefore furnished a simple and speedy test of what was swamp.

It will be observed that the language of the fourth section differs materially from that in the third. In the latter it is expressly
41 provided that "if, upon survey of such lands by the United States, the lines of the two surveys shall be found not to agree the selection shall be changed," etc. If the lawmaker intended by this fourth section to require an agreement in segregation lines between the State and United States surveys why did they not employ language similar to that used in the third section, which so clearly expressed that idea? The only reasonable answer that I can give is, that they did not mean the same thing in the two sections. If the first sentence in the second clause stood alone it would confirm all selections, when the maps and surveys of the State had been made on the rectangular system, and to which there is no adverse claim. But it does not. It is qualified by what follows: If one of two things were true, if the surveys were found to be not in accordance with the rectangular system, or if there had been no United States survey of the township, then there was no confirmation of the swamp land selections, but the Commissioner was required to direct the surveyor general to make segregation surveys, upon application to him by the Governor, within one year of the application, and to report the same to the General Land Office, and to represent and describe what land was swamp and overflowed, according to the best evidence he could obtain.

In other words, in all cases where the State surveys were not upon the rectangular system, and in all cases where there had been no

United States survey, the whole question as to what was swamp land was an open one, to be determined according to the actual facts in the case by the surveyor general, and upon the best evidence he could obtain.

Third. If the authorities of said State shall claim as swamp and overflowed any land not represented as such upon the map, or in returns of the surveyors, the character of such land at the
42 date of the grant—September 28th, 1850—and the right to the same shall be determined by testimony to be taken before the surveyor general, who shall decide the same subject to the approval of the General Land Office. This privilege given to the State I understand to be limited to surveys made in those townships where the geodetic system had been adopted, and to those where there had been no United States survey prior to the passage of the act.

In such cases the State was not concluded by the judgment of the surveyor general in making swamp land segregations, but was given the right to introduce testimony before him upon the character of the land, and he was to determine the question subject to the approval of the Commissioner of the General Land Office.

In my judgment this fourth section is confirmatory. It is argued that it is not, because the word confirm is used in the first section and not used in this. That is true, but words that are equivalent to it are used.

Under the land laws the making of a township plat by the surveyor general or his deputy, and the approval of it by the surveyor general and Commissioner of the General Land Office, is a final confirmation of such plat, and the swamp lands shown by such plat are always treated as swamp and listed to the State.

This well understood rule is recognized in this section, and instead of saying that the township plats found to conform to the system of surveys adopted by the United States shall be confirmed, it provides that the Commissioner shall direct the surveyor general to examine them, and when he finds them to conform to the said system he is required to approve. It thus becomes the official duty of the Commissioner and surveyor general to approve the plats, and when that is done it is to all intents and purposes a confirmation of
43 the same. It is a finality.

The fifth section required the Commissioner to instruct the local officers, immediately after the passage of the act, to forward their lists of all selections made by the State under the first section, and the surveyor general to forward maps of all swamp lands claimed by the State, which he should find had been surveyed by the State in accordance with the rectangular system, in townships already surveyed by the United States, and also all maps of swamp land claimed by the State, which he should himself survey in those townships where the State survey had not been upon the rectangular system, or where there had been no United States survey.

It also required the Commissioner to act upon all these matters without delay.

The construction which I have given to this law was the one adopted by the Commissioner of the General Land Office soon after

the act was passed, and embodied in the official instructions issued by him on the 13th of September, 1866.

In accordance with the foregoing construction I think the answers to the questions propounded by the Commissioner should be as follows:

First. The words "system of surveys adopted by the United States," as used in said section four, do mean the ordinary rectangular system of surveys adopted by the United States and embodied in the manual referred to.

Second. The lands segregated by the State of California prior to July 23d, 1866, by surveys made in conformity with such rectangular system, and to which there was no adverse claim, were confirmed to the State by the act of July 23d, 1866, in all townships which had been surveyed by the United States prior to that date, and in none other.

Third. The surveyor general, in the examination of segre-
44 gation surveys made by the State, on the rectangular system, and in townships that had been surveyed by the United States prior to July 23d, 1866, and in constructing township plats of such surveys, should not take into consideration the quality of the land embraced in such segregation surveys.

He is required to treat them as swamp and overflowed, whether they are so in fact or not.

Very respectfully, W. H. SMITH,
Assistant Attorney General.

Hon. C. DELANO, Secretary of Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December 5th*, 1871.

SIR: I have carefully considered the questions presented in your letter of the 16th of August last in regard to the construction of the act of Congress "To quiet land titles in California," approved 23d of July, 1866 (14 Stat., 218), and have arrived at the following conclusions:

1. That the first three sections of said act relate to lands which have been disposed of by the State to purchasers in good faith under her laws; and confirm to the State all such selections, except in the cases named in the proviso to the first section.

2. That the fourth section secures to the State, as swamp and overflowed, all lands that are represented as swamp on the approved plats of United States surveys that had been made prior to 23d July, 1866, or that should thereafter be made, and required all such lands to be certified over to the State in all cases where there was no adverse claim.

That said section required the United States surveyor general for the State of California to examine the segregation maps and surveys
of swamp lands made by said State, and when he should find
45 such maps in townships which had been surveyed by the United States prior to 23d July, 1866, to conform to the rectangular system of surveys prescribed by the United States, he was

required to construct and approve township plats in accordance with such State surveys; that the practical result of such approval was to secure to the State all the lands represented as swamp on such State segregation maps and surveys, as to which there was no adverse claim.

That in all townships where the State surveys do not conform to the rectangular system, and in all townships which had not been surveyed by the United States prior to 23d July, 1866, the surveyor general was required to make segregation surveys of swamp lands, upon application made to him by the Governor of the State and within one year from such application, and to report the same to the General Land Office; that in making these surveys he was to be governed by the best evidence he could obtain, and the State, if not satisfied with them, had the right to introduce testimony before the surveyor general, and to appeal from his decision to the Commissioner of the General Land Office.

That the surveyor general, in the examination of segregation maps which he should find conformed to the rectangular system in townships which had been surveyed by the United States prior to July 23d, 1866, and as to which there was no adverse claim, should not take into consideration the quality of the land embraced in such segregation surveys, but should treat them as swamp, whether they were so in fact or not.

You will take all necessary steps to carry the foregoing views into execution.

I transmit herewith an opinion on this subject prepared by Hon. Walter H. Smith, Assistant Attorney General. In the conclusions arrived at by Mr. Smith I fully concur, as I do generally in the reasons which he assigns for such conclusions.

46 I also transmit for your files numerous arguments and papers filed by attorneys of parties in interest since the matter was brought to my attention.

I am, sir, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Hon. WILLIS DRUMMOND,
Commissioner General Land Office.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec. 19th*, 1871.

J. R. HARDENBERGH, Esq., *Surveyor General, San Francisco, California.*

SIR: I enclose herewith copy of decision of the Honorable Secretary of the Interior, and of the opinion of the Assistant Attorney General, both rendered on the fifth instant, upon certain questions propounded by this office, in letter of sixteenth of August last, in the matter of the construction of the act of Congress approved July 23d, 1866, to quit land titles in California.

The instructions contained in our letters of July seventh and August eighth last, respectively, are still in force, in so far as they do not conflict with the decision of the Honorable Secretary.

You will give particular attention to the second conclusion in the said decision, as to the construction of the fourth section of the said act,

embraced in the third, fourth, fifth, and sixth paragraphs hereof. The principles therein enunciated for your government in the exercise of your official duties are so definitely and comprehensively set forth that you will have no difficulty in their proper application.

You will please acknowledge the receipt hereof.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

47 OFFICE OF THE SURVEYOR GENERAL OF THE UNITED STATES FOR CALIFORNIA.

I, James T. Stratton, surveyor general of the United States for the State of California, and as such having in my office and in my charge and custody a portion of the archives of the former Spanish and Mexican Territory, or Department of Upper California, as also the papers of the late Board of Commissioners to ascertain and settle the private land claims in California, by virtue of the power vested in me by law, do hereby certify that the forty-six preceding and hereunto annexed pages of paper, numbered from one to forty-six, inclusive, exhibit a true, full, and correct copy of the original:

I. Letter from Hon. Jos. Wilson to L. Upson (8 pages), dated September 13, 1866.

II. Letter from Hon. Willis Drummond to J. R. Hardenbergh (5 pages), dated August 8, 1871.

III. Opinion of Hon. C. Delano (31 pages), dated December 5th, 1871.

IV. Letter of Hon. Willis Drummond to J. R. Hardenbergh, dated Dec. 19th, 1871 (2 pages).

All relating to swamp lands in California claimed under acts of September 28th, 1850, and July 23d, 1866, and now on file in this office and my custody; that I have carefully compared the same with said originals, and that the same is a correct transcript therefrom, and of the whole of such originals.

In testimony whereof, I have hereunto signed my name officially and caused my seal of office to be affixed, at the city of San Francisco, this 24th day of January, 1876.

[SEAL.] JAS. T. STRATTON,
U. S. Surveyor General for California.

After plaintiff had closed his case defendant Roseberry then introduced in evidence:

1. A declaratory statement filed by one George Bolin in the United States land office, at Marysville, on the 2d day of September, 1864, for the purchase of the northeast quarter of section thirty-six, township eleven north, range two east, Mount Diablo meridian, as a preemption, in which statement he alleged his settlement on said land to have been made in March, 1864.

2. A patent from the United States to said George Bolin
48 for said northeast quarter, dated the 20th day of February, 1868.

3. A deed from said George Bolin to himself for the said quarter

section, dated the 1st day of January, 1871, duly executed, acknowledged, and recorded.

The defendant Roseberry also introduced in evidence with respect to the southeast quarter of section twenty-five, township eleven north, range two east—

1. His own declaratory statement for the purchase of said southeast quarter as a pre-emption claim, filed in the said United States land office at Marysville in the year 1864.

2. A patent of the United States to him for said quarter section, dated June 15th, 1866.

It was also proved that for some time prior to 1862 one Mrs. Posse lived upon the said southeast quarter of said section, in a house situate on the northerly part thereof, and had enclosed and usually cultivated fifteen or twenty acres thereof; that she died about the year 1862, and H. B. Wood was appointed administrator of her estate, who, as such administrator, in the month of February, 1864, sold and conveyed the said quarter section, as part of Mrs. Posse's estate, to the defendant Roseberry; the sale, petition for confirmation, and decree of confirmation by the probate court, having all been made upon the same day. The defendant Roseberry entered into possession under his purchase, and has ever since remained in possession of the said land and lived thereon; that in the year 1864 he enclosed all the said quarter section by a substantial fence, which he had from that time continuously maintained, and had every year cultivated a considerable portion of the quarter section, and had maintained continuously from 1864 up to the time of the trial open, notorious, adverse, and exclusive possession of the whole quarter section.

49 The defendant, Mrs. Permelia Simmons, introduced in evidence—

1. Declaratory statement of her husband, Silas George Simmons, filed in the said United States land office at Marysville, August 23d, 1864, for the purchase of the east half of the northeast quarter of said section twenty-five as a pre-emption claim, alleging settlement thereon in the year 1857.

2. Patent of the United States for said land, issued to the heirs of said Silas George Simmons, bearing date July 29th, 1871.

It was also proved that said Silas George Simmons enclosed a part of this land in 1857.

The defendant, Sarah A. Powell, introduced in evidence—

1. Declaratory statement of Josiah Lippincott, then her husband, filed in the United States land office at Marysville, California, on the 11th day of July, 1864, for the purchase of the east half and northwest quarter of the southeast quarter of section twenty-four, township eleven north, range two east, Mount Diablo meridian, as a pre-emption claim.

2. The patent of the United States, bearing date the 1st day of November, 1867, conveying the said east half and northwest quarter of the southeast quarter of said section twenty-four, to the heirs of said Josiah Lippincott; and proved that the said Josiah Lippincott

died on the 8th day of August, 1865; that she was his widow; that said Lippincott, in the fall of 1861, enclosed a portion of this land, with a fraction of land adjoining it on the east, and built a house on the fraction, and continued up to the time of his death, with his wife, the defendant, Sarah A. Powell, to occupy the house and enclosure; and that subsequent to his death she had continued to occupy and use the land up to the time of the trial, and had built a new house on said fraction.

It was also proved with respect to the lands involved in the
50 action that at the time of the commencement of the action and of the trial the defendant Roseberry was in the possession of the southeast quarter of section twenty-five and the northeast quarter of section thirty-six; that the defendat, Permelia Simmons, with her family, was in the possession of the east half of the northeast quarter of section twenty-five; that the defendant, Sarah A. Powell, was in possession of the east half and the northwest quarter of the southeast quarter of section twenty-four, and that the plaintiff Wright never had the possession of any portion of the said land.

Plaintiff and defendants respectively also introduced witnesses who had been acquainted with the lands in controversy for a series of years, who were examined as to whether, in their opinion, the said lands were on the 28th day of September, 1850, swamp and overflowed within the meaning of the act of Congress of that date, or otherwise, and as to the facts upon which such opinions were based; the testimony of which witnesses was conflicting upon said points.

And thereafter, to wit, on the eighth day of September, 1876, said cause having previously been submitted for decision, the court filed its findings of fact and conclusions of law, and ordered judgment to be entered thereupon; from a portion of which judgment plaintiff appealed to the supreme court of said State, and which judgment was reversed by said supreme court, and said cause remanded to said district court, with directions to find upon certain issues of fact, in the judgment of the supreme court specified, from the evidence theretofore taken, and from such further evidence as might be adduced by the respective parties, and thereupon to render judgment upon the whole case; all of which will more fully appear from the judgment roll on file herein.

And thereafter, on the 19th day of May, 1879, the said
51 cause came on for hearing upon additional evidence to be offered in pursuance of said judgment of said supreme court, whereupon the following proceedings were had:

Plaintiff introduced in evidence a copy of the plat of said township, approved by U. S. Surveyor General Hardenbergh April 4th, 1872, which plat was identical with that theretofore given in evidence, with the addition of the following certificate:

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *January 12th*, 1878.

I, J. A. Williamson, Commissioner of the General Land Office, do

hereby certify that the annexed copy of the plat of township eleven north, range two east, of Mount Diablo meridian, received with the surveyor general's letter of April 19th, 1872, and since which time it has been officially used as approved plat, made in accordance with section 2488 U. S. Revised Statutes, is a true and literal exemplification of said plat, bound in California plat book No. 180 in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above mentioned.

[SEAL.] J. A. WILLIAMSON,
Commissioner of General Land Office.

Plaintiff also introduced in evidence a copy duly certified by the U. S. surveyor general for California, of the following letter:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *April 19th*, 1872.

HON. WILLIS DRUMMOND,
Commissioner General Land Office, Washington, D. C.

SIR: I transmit in a separate roll by to-day's mail certified plats, also certified descriptive lists of the following townships, showing all tracts which the State of California claimed as swamp and overflowed prior to July 23d, 1866; also showing the segregation of swamp and overflowed lands made by the United States, viz:
52 Township eleven north, range one east; township eleven north, range two east; township twelve north, range two east, Mount Diablo meridian. The lists of said tracts contain annotations in red ink made by the register of the U. S. land office at Marysville, stating all titles to said lands adverse to the claims of the State of California, together with the register's certificate testifying to the correctness of such annotations, as appears from the records of this office.

These plats and lists are sent you in accordance with the instructions contained in your letter of July 7th, 1871, which enclosed for my guidance a copy of a letter addressed to L. Upson, U. S. surveyor general, dated Sept. 13th, 1866.

Very respectfully, your obedient servant,

J. R. HARDENBERGH,
U. S. Surveyor General for California.

Plaintiff then rested; whereupon defendants offered in evidence the following documents:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *August 5th*, 1879.

I, J. M. Armstrong, Acting Commissioner of the General Land Office, certify that the annexed paper, marked "A," and containing two (2) pages, is a true and literal exemplification of a letter from the surveyor general of the State of California, dated July 6th, 1877; also that the annexed paper marked "B," and containing three (3)

pages, is a true and literal exemplification of a letter from this office, dated July 24th, 1877, in reply to the foregoing; and that the annexed paper marked "C," and containing two (2) pages, is a true and literal exemplification of a letter from the Secretary of the Interior, dated January 8th, 1879, as the said letters appear on file and of record in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] J. M. ARMSTRONG,
Acting Commissioner of General Land Office.

53 "A."

STATE OF CALIFORNIA,
OFFICE OF SURVEYOR GENERAL,
SACRAMENTO, *July 6th*, 1877.

HON. J. A. WILLIAMSON, *Commissioner General Land Office.*

SIR: Herewith enclosed I have the honor to return certified copies of swamp land surveys, Nos. 582, 585, 588, 592, and 620 of Yolo county; certified copies of certificates of purchase No. 1657 (survey No. 582), No. 1658 (survey No. 585), No. 1659 (survey No. 588), No. 1660 (survey No. 592), and certified copy of the stub of certificate of purchase No. 105 (survey No. 620), the original having been lost or mislaid.

The land described in these surveys was all sold by the State in good faith as swamp and overflowed lands prior to the 23d July, 1866, and a portion of each of these surveys has already been listed and patented to the State.

The State now asks that the east half of northwest quarter, south half of northeast quarter, north half of southeast quarter, and southeast quarter of southeast quarter of section twenty-four, southeast quarter and east half of northwest quarter of section thirty-five, and east half of northwest quarter of section twenty-six, township eleven north, range two east, Mount Diablo meridian, may be listed.

Yours, very respectfully,

WM. MINIS,
Surveyor General.

"B."

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 24th*, 1877.

State Surveyor General, Sacramento, California.

SIR: I have received your letter of 6th inst., inclosing certified copies of surveys, certificates of sale, etc., of land claimed by
54 the State of California, by virtue of selection and sale as swamp land prior to July 23d, 1866, and asking that certain tracts specified by you in township eleven north, range two east, Mount Diablo meridian, may be certified to the State as swamp land.

In reply, I have to say that the lands which you request may be certified, except one tract, have been already disposed of; part of them were sold or located prior to July 23d, 1866, and the remainder under rights acquired prior to that date by settlers under the laws of the United States. Said sales are as follows, to wit: East half of northwest quarter of section twenty-four, to Alex. St. Louis; south half of northeast quarter of section twenty-four, to W. Lafave; north half of southeast quarter and southeast quarter of southeast quarter of section twenty-four, to heirs of Lippincott; southeast quarter of section twenty-five, to B. H. Roseberry; east half of northeast quarter of section twenty-five, to heirs of S. G. Simmons; east half of northwest quarter of section twenty-six, to Spencer Glasscock; northeast quarter of section thirty-five, to M. Eibes; northeast quarter of section thirty-six, to Geo. Bolin.

The tract not thus disposed of is the east half of northwest quarter of section thirty-five. Proof of the selection and sale of said tract was sent to this office in 1875, in the case of the State *vs.* W. F. Mock. Said tract is also within the State segregation, so that any farther proof of sale is not necessary.

The evidence of selection and sale, by virtue of which the State claims land under the act of July 23d, 1866—Revised Statutes, sections 2485, 2486, and 2487—should be sent to the register and receiver of the land office for the district in which the lands are situated, and your predecessor was so informed by letter from this office, dated July 14th, 1875.

55 You will please hereafter send such claims to the proper land office, and if there are any adverse claimants, they must be notified of the claim of the State and permitted to be heard in opposition thereto.

I return herewith the proof forwarded by you, which is defective, in that it lacks your official seal.

It will be useless, however, to present it, as the land is all disposed of, as before stated, except one tract, the sale of which is already sufficiently proved.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

"C."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *January 8th*, 1879.

SIR: On July 6th, 1877, William Minis, surveyor general of the State of California, made application to have certain lands in township eleven north, range two east, Mount Diablo meridian, certified to said State as swamp and overflowed lands.

On examination of the records of your office you found that all the tracts of land mentioned in said application (except one which has been certified to said State) had been patented to certain settlers under the pre-emption laws, and you therefore denied said application by decision dated July 24th, 1877, and the State has appealed from your decision.

It has frequently been decided by the Supreme Court of the United States that a patent, when issued and delivered to and accepted by the grantee, passes the legal title to the land, and all control of the executive department over the land thereafter ceases. If any lawful reason exists why the patent should be cancelled or annulled, such as fraud on the part of the grantee, or mistake
56 or misconstruction of the law on the part of your office, the appropriate remedy is by a bill in chancery, and an action may be maintained by the United States or any contesting claimant; but you are not authorized to reconsider the facts on which a patent was issued, and to recall or rescind it, or to issue one to another party for the same tract. (United States *vs.* Hughes, 11 How., 552; United States *vs.* Stone, 2 Wall., 525; Hughes *vs.* United States, 4 Wall., 232; Moore *vs.* Robbins, 6 Otto, 530.)

This Department has no control over the lands in question, and your decision is therefore affirmed.

The papers transmitted with your letter of July 17th, 1878, are herewith returned.

Very respectfully, C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

To the introduction of which evidence the plaintiff objected, on the ground that the same was immaterial and irrelevant; which objection was overruled by the court, and said documents were admitted in evidence; to which ruling plaintiff then and there duly excepted.

Defendants then offered in evidence the following documents:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *March 9th*, 1870.

Hon. JOS. S. WILSON,
Commissioner General Land Office, Washington.

SIR: I transmit herewith the notes of testimony and other papers in the case of lands claimed by the State of California as swamp and overflowed in township eleven north, range two east, Mount Diablo meridian, in which Tiery Wright and W. C. Wright appear as claimants, under the State, against Laugenour *et al.*, claimants as purchasers under a rejected grant, and as locators of lieu
57 lands; and also against Simmonds, Glascock, Lippincott, *et al.*, claimants of pre-emption rights, and Roseberry, claiming under patent from the United States.

About half the testimony has been taken before my predecessors, and having been examined by the hon. Commissioner of the General Land Office, was returned to me with the Commissioner's letter of the 2d of February, 1869, instructing me to review the case, issue new notices, and hold a new investigation, with more latitude as to the admission of testimony, etc., etc. A copy of the published notice is attached to this report.

The investigation was held at Knight's Landing, within two to four miles of the land in dispute, and I went personally to inspect

the land in company with the litigants on both sides. The utmost latitude was given for the admission of testimony, not only as to the condition of the lands in September, 1850, but also as to their condition and the natural and artificial agencies which may have affected their condition during the last 19 years.

Some of the testimony is from parties interested in a portion of the lands.

I found in this case what I had previously found near Stockton, an expensive irrigating ditch some miles in length, to bring the waters of Cache creek over lands in cultivation, which it is claimed cannot be cultivated successfully by reason of overflow from the same creek.

I found no persons residing in section thirty-five, nor or on that part of section twenty-six claimed as swamp land.

There were some fences and remains of a corral and of ditches, and evidences of former occupancy.

I do not remember any cultivation in progress while I was there.

I desire in this connection to refer to my remarks in the
58 case of lands near Stockton, sent up a few weeks since, in relation to the necessity of the adoption of some rule of determination as to the classification of swamp lands, which shall be applied to the peculiar climate of California.

These remarks are equally applicable to this case.

After a very careful analysis of both the former and more recent testimony, much of which is conflicting, and much of it the expression of the opinions of the witnesses rather than the statement of actual facts, I have come to a conclusion in the case as follows:

First. My opinion is that Deputy Surveyor Thompson might properly have added to his segregation of lands subject to annual overflow the south half and the northeast quarter of section thirty-six and the east half of the east half of section thirty-five. This I should add as belonging to that class without regard to any particular year or season.

Second. With the evidence now before me, and from my own observation, I should not have included in that segregation the east half of the northeast quarter of section twenty-five; but I do not know that the law of 23d July, 1866, gives me any power to change the act of my predecessor in that particular, except on proof of the malfeasance of the deputy, which in this case is not charged nor suspected.

Third. My opinion with regard to the other tracts in controversy depends upon the rule of determination under which the opinion is given.

If the rule of determination restricts the judgment to the condition of the lands in the fall of 1850, and the possibility of successfully cultivating them during the winter of 1850–'51, I should not add any to Deputy Thompson's segregation than what I have indicated above, because the fall of 1850–'51 was an exceedingly dry season, and so was the succeeding summer.

59 But if the rule of determination contemplates the condition of the land during an average or majority of the seasons for

the last 18 or 19 years, or generally through a fair average of seasons, then my opinion is that the following tracts should be conceded to the State, in addition to what Deputy Thompson has segregated, viz: Southwest quarter of southeast quarter of section twenty-six; east half of west half of section twenty-six; east quarter of southwest quarter of section twenty-three; north half of northeast quarter and southwest quarter of northeast quarter of section twenty-three; north half of northwest quarter of section twenty-four; southeast quarter of northwest quarter of section twenty-four; northwest quarter of southeast quarter of section twenty-four; south half of northeast quarter of section thirty-six.

Concerning the other tracts in litigation, they are undoubtedly occasionally troubled with water for a short period, but I do not consider the evidence sufficient to establish them in swamp and overflowed lands within the meaning of the act.

The southeast quarter of section twenty-five having been patented by the United States to the occupant Roseberry, I pass no opinion upon it.

Some of the witnesses have testified to facts relating to their own occupancy as pre-emptors, purchasers in good faith under a rejected grant, or locators of lieu lands; and some other witnesses have also testified to the occupancy of those parties, and designated the subdivisions upon which they were located, and the extent and nature of their improvements.

Whether in case the lands thus occupied should be finally decided not to be swamp land, the proof thus presented would be sufficient to entitle the occupants to perfect their entries at the local land offices, is a question which devolves, I suppose, properly upon
60 the register and receiver to decide after the suspension of the tracts shall be removed. The main duty devolving upon the surveyor general under the fourth section of the act of July 23d, 1866, is, I suppose, to determine a question of fact whether the land is or is not swamp and overflowed within the meaning of the act of 28th September, 1850—leaving the land office questions which may result from the determination of that fact to the officers having them specially in charge.

I have included among the papers a certified traced copy of a plat of the Rancho de Carmel (rejected), which was filed in this office at one time by C. F. Reed, with a view to surveys of land "purchased in good faith," etc. It shows that Langenour's claims are within the exterior boundaries of the grant as claimed.

Very respectfully, your obedient servant,

SHERMAN DAY,
U. S. Surveyor General for California.

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *March 31st*, 1876.

I, H. G. Rollins, U. S. surveyor general for California, do hereby certify that the foregoing transcript has been correctly copied from the original document as the same remains of record and on file in this office.

Attest my hand and official seal the day and date hereinabove written.

[SEAL.] H. G. ROLLINS,
U. S. Surveyor General for California.

GENERAL LAND OFFICE, *April 12th*, 1870.

Surveyor General, San Francisco, California.

SIR: I am in receipt of your report of the ninth ultimo, accompanied by testimony touching the character of certain lands in sections twenty-three, twenty-four, twenty-five, twenty-six, thirty-five, and thirty-six, township eleven north, range two east, Mount Diablo meridian, claimed by Tiery Wright and W. C. Wright, vendees of the State of California, as swamp lands.

61 Of the lands in contest the following have been finally disposed of, as respectively shown below, and are no longer within the control of this office, viz: Northeast quarter section twenty-four, entered by Wm. Lafave, November 18th, 1864, patented June 15th, 1866; north half of southeast quarter and southeast quarter of southeast quarter of section twenty-four, entered by heirs of Lippincott, patented November 1st, 1867; southeast quarter of section twenty-five, entered by Roseberry, patented June 15th, 1866; west half of northwest quarter section twenty-six, located by Spencer Glasscock, patented June 16th, 1866; northeast quarter section thirty-five, entered by Eibes, patented in 1866; northeast quarter section thirty-six, located by Bolin, patented February 20th, 1868.

The above-named tracts having been definitely disposed of, so far as this office is concerned, their cases need not be further considered.

The records further show that there are certain pre-emption claimants on some of the tracts who, if their claims are shown to have been made in good faith, are protected by the act of 1866, under which Mr. Wright claims his title. It is clear that if these claims were out of the way the lands would pass to Mr. Wright, as purchaser under the State, by virtue of the act of 1866. Before these tracts can be passed upon it will, therefore, be the duty of the pre-emptors to establish their right to the protection provided by the act referred to before the register and receiver; and to that end those officers will be notified of our action in this matter.

These pre-emption claims cover north half of northwest quarter and southeast quarter of northwest quarter of section twenty-four, northwest quarter section thirty-five, east half of northeast quarter section twenty five.

62 It appears that the north half of northeast quarter section twenty-three is also included in the declaratory statement of W. C. Wright; but as his own evidence unmistakably shows that tract to be swamp, it enures to the State under the grant of 1850.

The southwest quarter of northeast quarter section twenty-five lies within the swamp segregation lines; and its character as swamp (as shown both in your report and in the testimony of witnesses), when taken in connection with the fact of its original segregation

as swamp, should pass to the State, and it will accordingly be acted upon.

With the west half of the southeast quarter section thirty-five there is no conflict, except it be claimants under the rejected Mexican grant; and these can only hold under the provisions of the act of 1866. The same act confirms the title both under the rejected Mexican grant and also under purchase from the State as swamp. But before confirmation under the Mexican grant can be perfected certain requirements are made. The claimant must show that he has continued in use and possession, while no requirements are made in the case of the purchase from the State beyond establishing the fact that said purchase had been made in good faith. There is no satisfactory evidence showing that the claimant under the rejected grant has complied with these requirements; in fact, the testimony shows the opposite of this; and he cannot, therefore, now avail himself of the privilege of the act referred to to perfect his claim by entering the land. Farther than this, the testimony in the main tends to show that the tract is not susceptible of cultivation without artificial means of reclamation, and in equity as well as law should be passed to the State as swamp.

The adjoining tract, east half of southwest quarter section
63 thirty-five, is differently situated. The claimant under the rejected Carmel grant shows that he has paid taxes on, cultivated, and in various ways asserted a continuous possession of this tract. It is, at best, of doubtful character as to overflow, and in the opinion of this office should not be confirmed to the State to the prejudice of the purchaser under the Mexican grant. This case will, therefore, be referred to the register and receiver, with instructions to allow Mr. Langenour to enter the same upon satisfactory showing that his claim of title from the original grantor is complete, and that he has in all other respects complied with the law.

The only tract remaining in conflict is the southwest quarter of northeast quarter section twenty-three, which is claimed by both Wright and the Western Pacific Railroad Company; but, as your report and the testimony describe this tract as swamp, it will be listed accordingly.

The following tracts, viz., east half of southwest quarter section thirty-three; east half of southwest quarter section twenty-five; southwest quarter of southeast quarter and east half of southwest quarter section twenty-six; east half of southeast quarter section thirty-five; northwest quarter and south half of section thirty-six, all of which are shown to be swamp lands, and with which there are no conflict, will be forthwith certified to the State, provided no appeal be taken.

This disposes of all the tracts embraced in your reports, and you are hereby requested to notify all parties in interest of the decision in each case, giving the usual time for appeal, if any should desire to do so.

I am, sir, very respectfully, your obedient servant,

JOS. S. WILSON, *Commissioner.*

64 U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *March* 31*st*, 1876.

I, H. G. Rollins, U. S. surveyor general for California, do hereby certify that the foregoing transcript has been correctly copied from the original document, as the same remains of record and on file in this office.

Attest my hand and official seal, the day and date herein above written.

[SEAL.] H. G. ROLLINS,
U. S. Surveyor General for California.

To the introduction in evidence of each of said documents plaintiff objected, on the ground that the same were severally immaterial and irrelevant, and on the further ground that each of said documents consisted of matter not admissible in evidence under the answers of defendants, to wit, a former adjudication, which should have been specially pleaded. Said objections were overruled by the court, and each of said documents were admitted in evidence; to which several rulings plaintiff then and there duly excepted.

The above and foregoing is all the evidence given upon the several trials of the said cause.

And thereafter, to wit, on the 13th day of December, 1879, the court filed its findings of fact and conclusions of law; to which decision plaintiff duly excepted, and now excepts, on the following grounds:

I.

The evidence is insufficient to justify the finding of the court to the effect that plaintiff is not, and never was, the owner, nor entitled to, the possession of all or any part of the lands described in the complaint, in this, that the evidence shows that said lands were, on the 28th day of September, A. D. 1850, swamp and overflowed lands, made unfit thereby for cultivation, within the meaning of the act of Congress of that date, and remained unsold at the date of said act, and were by said act granted to the said State of California; and that the title of
65 said State thereto had vested in plaintiff, and still remained so vested; and for the further reason that the evidence showed that said lands were granted to the said State of California by the act of Congress of July 23d, 1866, entitled "An act to quiet land titles in California," and that the title of said State thereto had vested in plaintiff, and still remained so vested; and for the further reason that the evidence showed that plaintiff was, at the commencement of this action, the owner in fee and entitled to the possession of all of said lands.

II.

The evidence is insufficient to justify the finding of the court that all and singular the allegations of plaintiff's complaint are untrue, for the reasons set forth in the first specification herein, and for the reason that the evidence showed that, at the commencement of

this action, defendants were in possession of the lands described in said complaint, and withheld the possession thereof from plaintiff.

III.

The evidence is insufficient to justify the finding of the court to the effect that the allegations of defendants' respective amended answers are true, for the reasons stated in the first and second specifications herein, and for the reason that the evidence showed that plaintiff was seized of the whole of said premises within five years next before the commencement of this action.

IV.

The decision of the court is against law, in this, that by the judgment of the supreme court, hereinbefore referred to, said district court had authority to find only upon the issues set forth in said judgment of said supreme court, and not to set aside its findings upon the other issues in said cause, or to find contrary thereto.

And plaintiff specifies the following errors in law occurring at the trial and excepted to by the plaintiff, upon which he will rely in his motion for a new trial herein:

66 1. The court erred in sustaining defendants' objection to the question asked by plaintiff to the witness Twitchell, and in refusing to permit said question to be answered.

2. The court erred in overruling plaintiff's objections to the admission in evidence of the documents offered by defendants at the last hearing of said cause, and of each of them, and in admitting said documents, or any of them, in evidence against plaintiff's said objections.

W. B. TREADWELL AND
C. P. SPRAGUE,
Attorneys for Plaintiff.

The foregoing bill of exceptions, together with the amendments thereto, having been duly presented to me, I have allowed certain of said amendments, and disallowed others; and the said foregoing bill has been, this day, settled and allowed, and is correct and true.

Dated July 27th, 1880.

S. C. DENSON,
Ex-District Judge.

Endorsed: Filed July 28th, 1880. J. K. Smith, clerk, by Jos. LaBusier, deputy.

Second Judgment

(Title of Court and Cause.)

This cause came on regularly for hearing before the court, on the 19th day of May, 1879, upon additional evidence to be offered in pursuance of the judgment of the supreme court herein; whereupon

the respective parties appeared and offered testimony in support of their respective cases, and, after argument by counsel, the cause was submitted, and, by the court, taken under advisement.

67 And thereafter, on the 13th day of December, 1879, the court being fully advised in the premises, files its findings of fact and conclusions of law, and orders judgment to be entered accordingly.

Wherefore, by reason of law and the finding aforesaid, it is considered, ordered, and adjudged that the said plaintiff, Tiery Wright, take nothing by his suit, and that the said defendants, B. H. Roseberry Sarah A. Powell, and Permelia Simmons, have and recover of and from said plaintiff, Tiery Wright, their costs of suit, taxed at $782.75.

Entered September 28th, 1880.

J. K. SMITH, *Clerk.*

Order Denying New Trial.

(Title of Court and Cause.)

The motion of plaintiff for a new trial herein having been submitted, the same is hereby denied.

September 28th, 1880.

E. R. BUSH,
Judge of Superior Court, in and for Yolo County.

Endorsed: Filed Sept. 28th, 1880. J. K. Smith, clerk.

Notice of Appeal.

(Title of Court and Cause.)

To the defendants in the above-entitled action and Messrs. W. C. Belcher and J. C. Ball, their attorneys:

You will please take notice that the above-named plaintiff hereby appeals to the supreme court of the State of California, from the whole of the judgment rendered in said action on the 13th day of December, 1879, and entered on the 28th day of September, 1880; and

68 also from the order entered on the 28th day of September, 1880, denying plaintiff's motion for a new trial in said action.

W. B. TREADWELL AND
C. P. SPRAGUE,
Attorneys for Plaintiff.

Due service of copy of above notice of appeal is hereby admitted and undertaking on appeal waived this 28th day of September, 1880.

W. C. BELCHER AND
J. C. BALL,
Attorneys for Defendants.

Endorsed: Filed Sept. 28th, 1880. J. K. Smith, clerk.

Stipulation.

It is hereby stipulated, agreed, and certified that the above and foregoing 68 printed pages constitute a full, true, and correct transcript on appeal in the above-entitled action, and that an undertaking on appeal in said action has been waived.

W. C. BELCHER AND
J. C. BALL,
Attorneys for Respondents.
W. B. TREADWELL AND
C. P. SPRAGUE,
Attorneys for Appellant.

69 *Submission of Cause.*

In the Supreme Court, State of California. In Bank.

WRIGHT
v.
ROSEBERRY *et al.* } 7444.

NOV. 15, 1881.

Argued, and appellant allowed thirty days to file brief, and respondent thirty days to reply, and appellant thirty days thereafter, cause to be therein submitted.

Title of Court and Cause.

MAY 18TH, 1882.

Cause ordered submitted.

THE COURT.

70 Title Court and Cause.

AUG. 24TH, 1882.

Ordered that the order of submission heretofore made herein be, and the same hereby is, set aside, and that this cause be placed upon the Sacramento bank calendar for reargument, and that the attention of counsel be particularly invited to these questions: Had the court below the power to vacate the findings filed before the former appeal, and to find anew on all the issues raised by the findings? Was not the court on the last trial limited by the remit-itur to the issues upon which it had not found upon the first trial?

By the court.

Title Court and Cause.

NOV. 24, 1882.

Ordered that appellant have ten days to file brief, with 10 days hereafter to respondent to reply, cause to be submitted thereon.

By the court.

Title Court and Cause.

DEC. 12, 1882.

Filed respondents' brief and submitted.

71 Title Court and Cause.

MARCH 23, 1883.

Judgment and order affirmed.

SHARPSTEIN, J.

We concur.

THORNTON, J.
McKINSTRY, J.
ROSS, J.
McKEE, J.
MYRICK, J.

Title Court and Cause.

APRIL 11, 1883.

Filed petition for rehearing.

Title Court and Cause.

APRIL 20, 1883.

Rehearing denied.

THE COURT.

Title Court and Cause.

MAY 2, 1883.

Remit-it/ur stayed until further order.

THE COURT.

72 In the Supreme Court of the State of California. In Bank.

TIERY WRIGHT, Appellant,
vs.
B. H. ROSEBERRY *et al.*, Respondents. } No. 7444.

On appeal from the superior court, in and for the county of Yolo.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Sharpstein, J.

We concur.

THORNTON, J.
McKINSTRY, J.
ROSS, J.
McKEE, J.
MYRICK, J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Yolo, in the above-entitled cause, be, and the same are hereby, affirmed, with costs.

73 *Opinion. Filed March* 23, 1883.

In the Supreme Court of the State of California. In Bank.

WRIGHT
vs.
ROSEBERRY. } No. 7444.

The defendants are in possession of the demanded premises, and hold United States patents for the same. But it is claimed on behalf of the plaintiff that before defendants acquired any right or title to said land the title to it had passed out of the United States and become vested in the State of California. The grounds of this claim, as stated by one of appellant's counsel, are as follows: "That on July 1, 1862, he (plaintiff) acquired the title of the State to the land in controversy; that the State had, prior to July 23, 1866, selected this land as swamp land, and had dispossd of the same to purchasers in good faith under her laws; that due notice had been given to the United States Land Department of this selection; that within the time required by the act of Congress of March 12, 1860, and before 1866, the State had segregated these lands as swamp; and that, under due and regular proceedings had under the fourth section of the act of 1866, this segregation was approved by the United States Land Department, and the tracts here claimed designated swamp on the United States plat of the township."

The clause of the fourth section of the act of 1866, to which reference is made, reads as follows:

"That in all cases where township surveys have been made or shall hereafter be made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California as swamp and overflowed all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats.

"The Commissioner shall direct the United States surveyor-general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly and forward to the General Land Office for approval."

It is not claimed that "the Commissioner of the General Land Office has ever certified over to the State of California as swamp and overflowed" any of the land in controversy. If he had it would be equivalent to a patent, and an action of ejectment might be maintained upon it against any one in possession under a subsequently acquired title. As it is the defendants are in possession, claiming title under United States patents, which purport to convey the entire premises. And the question is, can the plaintiff maintain this action upon the title which he has acquired from the State, without showing that the land has been certified over to the State as swamp and overflowed? Counsel for appellant insist that although said

land has never been certified over to the State according to the requirement of said act of Congress the title to said land, nevertheless, became vested in the State. If that be so, the clause which requires the Commissioner to certify over to the State as swamp and overflowed all the lands represented as such, upon such approved plats within one year from the passage of said act, or within one year from the return and approval of such township plats, is superfluous. The act of September 28, 1850, contains a clause somewhat similar to this, and the construction which was given to it by the Supreme Court of the United States in French *vs.* Fyan (93 U. S., 169) seems to us to militate against the position which appellant's counsel seek to maintain in this case. That act made it the duty of the Secretary of the Interior, as soon as practicable after its passage, to make out an accurate list and plats of the land described in said act, and to transmit the same to the Governor of the State, and at his request to cause a patent to issue to it, and that thereupon the fee simple to said lands should vest in the State. In French *vs.* Fyan, *supra*, the court held that the issuance of a patent to the State concluded the question of the character of the land, and that parol evidence to prove that it was not swamp and overflowed was, in an action at law, inadmissible. That the law devolved upon the Secretary "the duty, and conferred on him the power of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was controlling."

In Johnson *vs.* Towsley (13 Wall., 72), the same court said: "That when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others."

Section 4 of the act of July 23, 1866, makes it the duty of the Commissioner in certain specified cases to certify lands over to the State. And it seems to be left to him to decide in each case whether or not it is a proper one for the exercise of that power. The most that can be claimed on behalf of appellant is that the Commissioner has not performed his duty in this case. The law makes it the duty of the Commissioner to certify over such lands within a specified period, but does not provide that in the event of his failing to, the title to such lands shall vest in the State. And we are unable to find anything in said section 4 which impresses us as indicating that such was the intention of Congress.

But it is claimed on behalf of appellant that said section 4 must be read in connection with section 1 of the same act, which confirms to the State lands selected by her in part satisfaction of any grant, and under her laws disposed of to purchasers in good faith.

In Sutton *vs.* Fassett (51 Cal., 12), the court said: "The first section of that act does not relate to lands which had been segregated by the State as swamp and overflowed lands. The only section which purports to grant to the State—or in other words to confirm such segregation—is the fourth section." And that appears to us to be a reasonable construction of the language of said first section. It only applies to selections made of any portion of the public do-

main "in part satisfaction of any grant made to said State by any act of Congress." This would seem to have reference to grants of specific quantities and not to a grant of an indefinite quantity. There would be no propriety in saying that the State accepted any number of acres of swamp land in part satisfaction of the grant of all the swamp land in the State. But in the cases of grants for school and improvement purposes where the quantities are limited and defined, deductions could be made, and it is expressly provided in said first section: "That the State of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law."

We therefore conclude that the title to the demanded premises has never vested in the State, and that the State could not convey a title to the appellant upon which he could maintain an action of ejectment against persons in possession of said premises under patents from the United States.

On the former appeal a remittitur issued out of this court containing the following order and directions:

"It appearing that the court below has failed to find upon material issues made by the pleadings, to wit, whether or not the plaintiff is the owner or entitled to the possession of the north half of the northeast quarter of section thirty-six, the southeast quarter of section twenty-five, and the east half of the southeast quarter of section twenty-four of the lands in suit.

"Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the sixth judicial district, in and for the county of Yolo, in the above-entitled cause be, and the same is hereby, reversed, and the cause remanded with directions to the court below to find upon the foregoing issues, from the evidence already taken and such further evidence as may be adduced by the respective parties, and thereupon to render judgment upon the whole case. The respective appellants in said actions severally to recover costs on the appeal."

The court did find "that at the time of the commencement of this suit the plaintiff was the owner, and entitled to the possession of the south half of the northeast quarter of section thirty-six, in suit, which was unlawfully withheld from him by defendant Roseberry; and of the east half of the northeast quarter of section twenty-five (containing eighty acres), which was withheld by defendant Simmons; and of the northwest quarter of the southeast quarter of section twenty-four, which was withheld from him by defendant Powell; and that plaintiff is damaged by defendant Roseberry in the sum of $150, by defendant Simmons in the sum of $150, and by defendant Powell in the sum of $75.

74 In addition to the lands described in this finding, the plaintiff in his complaint alleged that he was the owner of the lands described in the remittitur. On the last trial the court set aside its former findings, and found that the plaintiff was not and never had been the owner, or entitled to the possession of all or any part of the lands described in the complaint, and entered judgment in favor of the defendants. In doing so, appellant's counsel insist that

the court did not follow the directions of this court, which were in effect that the court below should find, in addition to what it had already found, whether the plaintiff was owner or entitled to the possession of the lands described in said remittitur. This might be so, if this court had not reversed the judgment of the court below and directed it to render a judgment upon the whole case. We think the order and directions of this court, taken as a whole, amount to a reversal of the former judgment, and an order for a new trial.

There were some exceptions taken to the rulings of the court during the trial, but we are unable to discover any error for which the judgment and order appealed from should be reversed.

Judgment and order affirmed.

SHARPSTEIN, J.

We concur:
THORNTON, J.
McKINSTRY, J.
ROSS, J.
McKEE, J.
MYRICK, J.

75 *Petition for Rehearing.*

In the Supreme Court of the State of California.

TIERY WRIGHT, Appellant, *vs.* B. H. ROSEBERRY *et al.*, Respondents. } No. 7444.

W. B. Treadwell and C. P. Sprague, for Appellants.

76 *Petition for Rehearing.*

In the Supreme Court of the State of California.

TIERY WRIGHT, Appellant, *vs.* B. H. ROSEBERRY *et al.*, Respondents. } No. 7444.

To the honorable the supreme court of the State of California:

The appellant in the above-entitled cause respectfully prays the court to grant him a rehearing therein on the following grounds:

The opinion of the court on file herein proceeds upon the theory that the fourth section of the act of Congress of July 23rd, 1866, does not operate to pass the title of any land to the State until such land is certified over to the State by the Commissioner of the General Land Office. As no such position was taken by counsel
77 for respondents upon the argument, we did not perhaps discuss this point as fully as we otherwise should have done; and we therefore ask the indulgence of the court if we shall, to some extent, review the ground already partly gone over.

The following extracts from the opinion herein sufficiently show the view taken by the court:

"The question is, can the plaintiff maintain this action upon the

title he has acquired from the State without showing that the land has been certified over to the State as swamp or overflowed? Counsel for appellant insist that, although said land has never been certified over to the State according to the requirement of said act of Congress, the title to said land, nevertheless, became vested in the State. If that be so, the clause which requires the Commissioner to certify over to the State as swamp and overflowed all the lands represented as such upon such approved plats within one year from the passage of said act, or within one year from the return and approval of such township plats, is superfluous."

"The act of September 28, 1850, contains a clause somewhat similar to this, and the construction which was given to it by the Supreme Court of the United States in French *vs.* Fyan (93 U. S., 169), seems to us to militate against the position which appellant's counsel seek to maintain in this case."

"Section 4 of the act of July 23, 1866, makes it the duty of the Commissioner in certain specified cases to certify lands over to the State. And it seems to be left to him to decide in each case whether or not it is a proper one for the exercise of that power. The law makes it the duty of the Commissioner to certify over such lands within a specified period, but does not provide that in the event of his failing to, the title to such land shall vest in the State. And we are unable to find anything in said section 4 which impresses us as indicating that such was the intention of Congress."

We believe that we can show without difficulty that in so
78 holding the court has fallen into a fundamental error as to the nature and scope of the legislation referred to.

1. As to the act of 1850, numerous and repeated decisions have established the contrary rule. In Summers *vs.* Dickinson (9 Cal., 555), this court says:

"Provision was made in the act for the survey of those lands and for the issuance of a patent to the State whenever their extent and boundaries were ascertained. But the title of the State in no way depends on the patent. The act itself operated as a conveyance. The language of the act is explicit: 'The whole of these swamp and overflowed lands, &c., are hereby granted to said State;' and, immediately upon its passage, the State became the owner of the land, with absolute power of disposition."

And in French *vs.* Fyan (93 U. S., 170), the Supreme Court of the United States says:

"This court has decided more than once that the swamp-land act was a grant *in præsenti*, by which the title to those lands passed at once to the State in which they lay."

It is undoubtedly true that, under that act, it remained to be determined what lands passed by the grant; but, although the duty of making such determination devolved upon the Secretary of the Interior, and his decision was conclusive, the fact could be established in other ways in case that officer should fail to act in the premises. In Railroad Company *vs.* Smith (9 Wall., 99), the Supreme Court of the United States says:

"By the second section of the act of 1850 it was made the duty of

the Secretary of the Interior to ascertain this fact," (*i. e.*, whether the lands were swamp), "and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, be-
79 cause that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the State might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay."

Accordingly it was held in that case that where the Secretary had failed to act, parol evidence was admissible in an action of ejectment to prove that the land was in fact swampy at the date of the grant. This decision was approved in French *vs.* Fyan (*supra*), the court saying:

"There was no means, as this court has decided, to compel him (the Secretary of the Interior) to act, and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty."

It is, therefore, as clear as any proposition can be made, that the title of the State under that act did not depend upon affirmative action by the Secretary.

2. But, under the fourth section of the act of July 23rd, 1866, the right of the State is far more precise and definite, and depends still less upon certification or patent. It will be observed that, under the act of 1850, the actual character of the land was the test to be applied, and the Secretary had therefore some discretion in the premises. But this section prescribes a different test, namely, segregation by the State, and conformity
80 of such segregation to the system of surveys adopted by the United States. The section further provides the method by which this test is to be applied, namely, the examination of the State segregation maps and surveys by the U. S. surveyor general under instructions from the Commissioner, the construction and approval, by the surveyor general, of township plats according to such segregation, and the approval of these plats by the Commissioner. All these things were done in this case. The land was segregated as swamp by the State; the State maps were examined by the surveyor general, under instructions from the Commissioner, and the segregation found to be in conformity with the system of surveys adopted by the United States; the surveyor general constructed and approved township plats accordingly, on which these lands were represented as swamp, and forwarded them to the Commissioner for approval; and said plats were thereupon approved by the Commissioner. Thus everything in which any discretion could be exercised by the Commissioner or any other officer was performed, and there remained only the ministerial duty of certifying the lands over to the State. In this matter no discretion existed; the Commissioner was not to certify in cases which he might

think "proper ones for the exercise of that power;" but he was to certify, within one year, all the lands represented as swamp upon such approved plats. This provision was simply intended
81 for the benefit of the State, in order that she might obtain ready and conclusive evidence of her title, and how it can be construed as operating so as to deprive her of the benefits of the act we are at a loss to imagine.

The language used by the Assistant Attorney General in his opinion on this question is exceedingly lucid. He says:

"In my judgment this fourth section is confirmatory. It is argued that it is not, because the word confirm is used in the first section and not used in this. That is true, but words that are equivalent to it are used.

"Under the land laws, the making of a township plat by the surveyor general or his deputy, and the approval of it by the surveyor general and Commissioner of the General Land Office is a *final* confirmation of such plat; and the swamp lands shown by such plat are always treated as swamp and listed to the State.

"This well understood rule is recognized in this section, and, instead of saying that the township plats found to conform to the system of surveys adopted by the United States shall be confirmed, it provides that the Commissioner shall direct the surveyor general to examine them, and, when he finds them to conform to the said system, he is required to approve. It thus becomes the official duty of the Commissioner and surveyor general to approve the plats, and, when that is done, it is to all intents and purposes a confirmation of the same. It is a *finality*."

Trans., fol. 164.

See also 1 Lester's Land Laws, 560, 552.

This opinion was approved and adopted by the Secretary of the Interior, who say, in his letter of instructions to the Commissioner:

"That the fourth section secures to the State, as swamp and overflowed, all lands that are represented as swamp on the approved plats of United States surveys that had been made prior to
82 23rd July, 1866, or that should thereafter be made, and required all such lands to be certified over to the State in all cases where there was no adverse claim.

"That said section required the United States surveyor general for the State of California to examine the segregation maps and surveys of swamp lands made by the State, and when he should find such maps in townships which had been surveyed by the United States prior to the 23rd July, 1866, to conform to the rectangulr system of surveys prescribed by the United States, he was required to construct and approve township plats in accordance with such State surveys; that the practical result of such approval was to secure to the State all the lands represented as swamp on such State segregation maps and surveys as to which there was no adverse claim."

Trans., fol. 173.

This section, therefore, supplies the definition of boundaries want-

ing under the act of 1850, making that grant in all respects perfect, and the listing or patenting of the lands is not a prerequisite to the vesting of the title.

A question precisely similar was decided by the Supreme Court of the United States in the case of Railroad Company *vs.* Fremont County (9 Wall., 89). In that case the defendant in error (Fremont County) filed a bill to quiet its title to certain lands in the State of Iowa. These lands were claimed under the act of Sept. 28th, 1850, and an act of Congress of March 3d, 1857, which provides as follows:

"That the selection of swamp and overflowed lands granted to the several States by the act of Congress approved September 28, 1850, and the act of 2nd March, 1849, heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated and not interfered
83 with by an actual settlement under any existing laws of the United States, be, and the same are hereby, confirmed, and shall be approved and patented to the several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable."

These lands had been selected by the State and reported to the Commissioner before the passage of the latter act, but had not been approved or patented. Under this state of facts it was held to be competent for the claimant under the State to prove that the lands were vacant and unappropriated, and not interfered with by actual settlement, and that, such proof having been made, the title to the lands had vested in the State. In the subsequent case of Railroad Company *vs.* Smith (*supra*), the court, commenting on the former decision, says:

"In the former case it was necessary for the plaintiff, who must succeed on the strength of her own title, to show satisfactory evidence that the title of the United States had, under the swamp-land grant, become vested in Fremont county. The opinion of the Court shows how this was successfully done in that case."

It is, therefore, as clear as the decision of the Supreme Court of the United States can make it that, in such cases, neither listing nor patenting is necessary to vest the title; and we think it may be laid down as a plain rule that where, by an act of Congress, lands granted to a State are directed to be listed or patented to the State without conditions, or upon conditions which have been performed, the grant takes effect without the list or patent. This certainly is the
84 result of the decisions we have cited, and we are sure that no case can be found to the contrary. As was said by the Supreme Court of the United States in Stark *vs.* Starrs (6 Wall., 402), "The right to a patent once vested is treated by the Government, when dealing with the public lands, as equivalent to a patent issued." In the present case the sole ground of the refusal of the Secretary to list these lands was 'that patents having been issued to the defendants here, the executive department had no further control over the matter. In this he was clearly wrong.

S. V. R. Co. *vs.* Cook, 10 Pac. C. L. J., 59.
Stoddard *vs.* Chambers, 2 How. U. S., 84.
Stark *vs.* Starrs, 6 Wall., 402.

But he did not decide whether or not the land was swamp, or whether or not it inured to the State under the act of 1866; on the contrary, he refused to pass on these questions. (Trans., fols. 217 to 220.) We are therefore brought directly within the case of Railroad Company *vs.* Smith (*supra*), so far as the act of 1850 is concerned; while, as we have shown, under the act of 1866 every act on the part of that officer which was necessary to make out our title had been performed.

The questions in this case are of great practical importance, and certainly are not free from difficulty. The point on which the decision rests was not raised or alluded to by counsel for re-
85 spondents, and we therefore feel justified in asking the court to consider the views here indicated, as also the argument on point I in the brief of Mr. Treadwell for appellant, on file herein, (pp. 2 to 10 and 17 to 19); and if, upon such examination, any doubt shall arise in the mind of the court as to the correctness of its decision, we believe that we can, upon further argument, resolve that doubt in favor of appellant.

Respectfully submitted.

W. B. TREADWELL AND
C. P. SPRAGUE,
For Appellant.

86 *Bond.*

In the Supreme Court of the United States.

TIERY WRIGHT, Plaintiff in Error,

vs.

B. H. ROSEBERRY, FLEMING GUITTAR, PERMELIA SIMMONS, and SARAH POWELL, Defendants in Error.

Know all men by these present that we, Tiery Wright, as principal, and W. W. Brownell and D. V. Hershey, both of the county of Yolo, State of California, as sureties, are held and firmly bound unto B. H. Roseberry, Fleming Guittar, Permelia Simmons, and Sarah Powell in the penal sum of three thousand dollars, gold coin of the United States of America: for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these present.

Sealed with our seals and dated this third day of May, A. D. 1883.

The condition of this obligation is such that whereas the
87 above-named Tiery Wright hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of California: Now, therefore, if the above-named Tiery Wright shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea,

then this obligation shall be void; otherwise to remain in full force and virtue.

TIERY WRIGHT. [SEAL.]
W. W. BROWNELL. [SEAL.]
D. V. HERSHEY. [SEAL.]

STATE OF CALIFORNIA, }
County of Yolo, } ss:

W. W. Brownell and D. V. Hershey, the sureties named in the foregoing bond, being severally duly sworn, each for himself, deposes and says: That he is worth the sum mentioned in the foregoing
88 bond as the penalty thereof over and above all his debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the State of California.

W. W. BROWNELL.
D. V. HERSHEY.

Subscribed and sworn to before me, this 3d day of May, 1883.
[SEAL.] C. P. SPRAGUE,
Notary Public.

The foregoing bond is hereby approved, this 7th day of May, 1883.

McKEE,
Acting Chief Justice of the Supreme Court of the State of California.

Endorsed: Filed 7th May, 1883. J. W. McCarthy, clerk, by Jno. Kilsby, deputy.

89½ [Endorsed:] Supreme Court of the United States. Tiery Wright, plaintiff in error, *vs.* B. H. Roseberry, Fleming Guittar, Permelia Simmons, Sarah Powell, defendants in error. Security. Bond on writ of error. Filed 7th day May, 1883. J. W. McCarthy, clerk, pr. John Kilsby, deputy.

90 *Citation.*

UNITED STATES OF AMERICA, ss:

To B. H. Roseberry, Flemming Guittar, Permelia Simmons, and Sarah Powell, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the second Monday of October, A. D. 1883, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Tiery Wright is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable S. B. McKee, acting chief justice of the supreme court of the State of California, this 7th day of May, A. D.

1883, and of the Independence of the United States the one hundred and seventh.

S. B. McKEE,
Acting C. J.

90½ Due service of the within citation is hereby admitted, this 21st day of July, 1883.

W. C. BELCHER,
Attorney for Defendants in Error.

[Endorsed:] United States Supreme Court. Tiery Wright *vs.* B. H. Roseberry *et al.* Citation. Filed August 4th, 1883. J. W. McCarthy, clerk, per J. S. Williams, deputy. 7444.

91 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment in a plea which is in the said supreme court before you, between Tiery Wright, plaintiff, and B. H. Roseberry, Flemming Guittar, Permelia Simmons, and Sarah Powell, defendants, wherein the said plaintiff claimed title to the demanded premises therein under and by virtue of the act of the Congress of the United States entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28, 1850, and under and by virtue of the act of the Congress of the United States, entitled "An act to quiet land title in California," approved July 23, 1866, and wherein the decision of said court was against the title so specially set up and claimed by said plaintiff under the statutes aforesaid, a manifest error hath happened to the great damage of the said Tiery Wright, plaintiff, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States this first day of May, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh.

L. S. B. SAWYER, *Clerk.*

The above writ of error is hereby allowed.

McKEE,
Acting C. J.

91½ [Endorsed:] United States. Tiery Wright *vs.* B. H. Roseberry *et al.* Writ of Error. Filed 7th May, '83. Jno. W. McCarthy, clerk, by Jno. Kilby, deputy.

92 *Clerk's Certificate.*

In the Supreme Court of the State of California.

TIERY WRIGHT, Plaintiff in Error,
vs.
B. H. ROSEBERRY, PERMELIA SIMMONS, FLEMMING GUITTAR, SARAH POWELL, Defendants in Error.

I, J. W. McCarthy, clerk of the supreme court of the State of California, do hereby certify that [the] foregoing ninety-two pages, numbered from one to ninety-two, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court, this 8th day of August, 1883.

[SEAL.]

J. W. McCARTHY, *Clerk.*
By J. S. WILLIAMS, *Deputy.*

Endorsed on cover: California supreme court. No. 722. Tiery Wright, plaintiff in error, *vs.* B. H. Roseberry, Flemming Guittar, Permelia Simmons, and Sarah Powell. Filed 12th October, 1883.

121-488

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1883.

NO. 722.

Tiery Wright,

Plaintiff in Error.

VS.

S. H. Roseberry, Flemming Guittat, Permelia Simmons and Sarah Powell,

Defendants in Error.

IN ERROR TO THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

PLAINTIFF'S BRIEF BY C. P. SPRAGUE.

TRANSCRIPT FILED OCTOBER 12, 1883.

Filed ..... *1887.*

..... *Clerk,*

By ..... *Deputy.*

WOODLAND:
"DAILY MAIL" JOB PRINT.
1887.

In the Supreme Court of the United States.

TIERY WRIGHT,
Plaintiff in error,
vs.
B. H. ROSEBERRY, *et al.*,
Defendants in error.

PLAINTIFF'S BRIEF.

The decision in this case will involve the construction of the U. S. Statutes in relation to the public lands in the State of California.

The action was in ejectment, originally commenced in the District Court of the Sixth Judicial District of the State of California, on the 9th day of December, 1870. (Transcript, pp. 1, 2.)*

By Sec. 2 of the Act of the 28th of September, 1850, the selection of the lands known as swamp and overflowed lands devolved upon the Secretary of the Interior. (9th U. S. Statutes, p. 519.)

On the 9th of September, 1850, California was admitted as a State by act of Congress of that date, and by the third section of said act it was provided that the people of said State should not interfere with the disposal of the public lands within her limits. (9th U. S. Statutes, p. 452.)

On the 3d of March, 1853, Congress passed an act to provide for the survey of public lands in the State of California. Sec. 6 of said act contains the following language: "And be it further enacted that all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of *Sec. 16 and 36, which shall be and are hereby granted* to the State for the purposes of the public schools in said Township." The same section contains this proviso: "*Provided* that nothing in this act shall be construed to authorize any settlement to be made *on any public land not surveyed, unless the same be made within one year from the passage of this act; nor shall any right of such settlers be recognized by virtue of any settlement or improvement made of such unsurveyed lands subsequent to that day.* (10th U. S. Statutes, p. 244.)

On the 1st of March, 1854, Congress passed another act, which provided that the proviso of Sec. 6 of the act above cited should be

* When pages of the transcript are mentioned in this brief, the references are to printed pages.

extended so that parties might settle upon the public lands within two years from the passage of the act, to-wit, until the 1st of March, 1856. (10th U. S. Statutes, p. 268.)

I am not aware of any further Congressional legislation upon the subject of swamp lands applicable to the State of California until the the 12th of March, 1860, at which time Congress passed an act entitled: "An act to extend the provisions of an act entitled 'to extend the provisions of an act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits' to Minnesota and Oregon, *and for other purposes.*" Sec. 2 of said act is as follows: "And be it further enacted that the selection to be made from lands *already surveyed* in each of the States, including Minnesota and Oregon, under the authority of the act aforesaid, and of the act to aid the State of Louisiana in draining the swamp lands therein, approved March second, eighteen hundred and forty-nine, shall be made within two years from the adjournment of the Legislature of each State at its next session after the date of this act." (12th U. S. Statutes, p. 3.)

Whatever the force and effect of the last-named statute may have been, it was construed by the State of California, and recognized by the General Government (as will be shown hereafter), as shifting the burthen of determining what were, and what were not, swamp lands within the meaning of the Swamp Land Act, from the Secretary of the Interior to the States wherein such lands were situated, and accordingly on the 13th of May, 1861, the Legislature of the State of California, at the next session of its Legislature after the passage of the last-named act of Congress, passed an act making it the duty of the county surveyors of the several counties of the State to segregate the swamp and overflowed lands within their respective counties from the high lands in said counties. (Statutes of California of 1861, p. 355.)

In accordance with this statute of the State of California, Amos Mathews, in 1862, then county surveyor of Yolo county, segregated the swamp and overflowed lands in said county, made a map thereof, on which all the lands in controversy were designated as swamp lands, and deposited the same in the State land office, and the survey thereof conformed to the system of surveys adopted by the United States. (Transcript, pp. 5, 11, 12, 13 and 14.)

On the first of July, 1862, one J. W. Tuttle purchased from the State as swamp and overflowed lands the south-east quarter and the south half of the north-east quarter of Section 24, and the east half of Section 25, in which said lands are described as swamp and overflowed, granted by the United States to the State of California by the act of Congress of the 28th of September, 1850.

On the same day (July 1st, 1862), one W. H. Davis purchased from the State the east half and the southwest quarter of Section 36 and the south-east quarter of Section 35, in which said lands are described as swamp and overflowed lands granted by the United States to the State of California by act of Congress of the 28th of September, 1850. The description in these two certificates embraces all the lands in controversy, one of which certificates was assigned to plaintiff on the

10th of July, 1862, and the other on the 14th of January, 1864, and he is still the holder of both of them. (Transcript, pp. 10, 11, 4, 5.)

In the year 1864 these lands were surveyed and sectionized in the field by the authority of the United States, which survey and the plat thereof were approved by the United States Surveyor-General for California on *the 10th day of January, 1866*, by which survey and plat *the east half of the north-east quarter of Section 25 was designated as swamp and overflowed land;* the other portions of the lands in suit were not so designated. (Transcript, pp. 5, 11.)

The year 1862, being the year in which the segregation was made by the State, by Mathews, the county surveyor, is still remembered and designated as "the year of the flood," and it is a well-remembered fact that much of the country was inun ated and rendered thereby unfit for cultivation through the ordinary seeding, growing and harvesting seasons. Under these circumstances it would not seem strange that the surveyor should have designated some of the lands as swamp or overflowed which were in fact not such according to the true intent and meaning of the original Swamp Land Act. It is equally well remembered that the year 1864, in which the segregation was made by authori y of the United States, was the dryest season ever known in California within its history, and is yet spoken of as "the dry season" or "the year of the drouth;" a season when the wettest of the lands in the State, with the exception of a few small depressions or basins, did not contain moisture enough to produce any character of vegetation. It would then not seem strange that the surveyor should designate as dry land very much which was in fact swamp and overflowed under the true intent and meaning of the act of the 28th of September, 1850. Under these circumstances controversies and vexatious litigations arose, involving the question as to the character of lands on the 28th of September, 1850, at which time agricultural pursuits had not commenced, and the entire population was in the mining regions or in the market towns where miners obtained their supplies. The debris floating down from the mines were constantly filling the low and overflowed lands, until the overflow ceased and the face of the country became materially changed, so that it was difficult to determine what the character of the lands were in September, 1850, and the courts hesitated in determining whether they should adopt the segregation made by the State or that made by the United States, or reject both and attempt the difficult task of proving the character of the lands by parol.

On the 23d of July, 1866, Congress passed an act entitled, "An act to quiet land titles in California." (14th U. S. Statutes, p. 218.) The case at bar involves the construction of said act, the first four sections of which are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State: *Provided*, That no selec-

tion made by said State *contrary to existing laws* shall be confirmed by this act for lands to which any adverse pre-emption, homestead, or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to any lands which have been reserved for naval, military, or Indian purposes by the United States, or to any mineral land, or to any land held or claimed under any valid Mexican or Spanish grant, or to any land which, at the time of the passage of this act, was included within the limits of any city, town, or village, or within the county of San Francisco: *And provided further*, That the State of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law.

"SEC. 2. *And be it further enacted*, That where the selections named in section one of this act have been made upon land which has been surveyed by authority of the United States, it shall be the duty of the proper authorities of the State, where the same has not already been done, to notify the register of the United States land office for the district in which the land is located of such selection, which notice shall be regarded as the date of the State selection, and the Commissioner of the General Land Office shall, immediately after the passage of this act, instruct the several local registers to forward to the General Land Office, after investigation and decision, all such selections, which if found to be in accordance with section one of this act, the commissioner shall certify over to the State in the usual manner.

"SEC. 3. *And be it further enacted*, That where the selections named in section one of this act have been made from lands which have not been surveyed by authority of the United States, but which selections have been surveyed by authority of and under the laws of said State, and the land sold to purchasers in good faith under the laws of the State, such selections shall, from the date of the passage of this act, when marked off and designated in the field, have the same force and effect as the pre-emption rights of a settler upon unsurveyed public land; and if, upon survey of such lands by the United States, the lines of the two surveys shall be found not to agree, the selection shall be so changed as to include those legal subdivisions which nearest conform to the identical land included in the State survey and selection. Upon the filing with the register of the proper United States land office of the township plat in which any such selection of unsurveyed land is located, the holder of the State title shall be allowed the same time to present and prove up his purchase and claim under this act as is allowed pre-emptors under existing laws; and if found in accordance with section one of this act, the land embraced therein shall be certified over to the State by the Commissioner of the General Land Office.

"SEC. 4. *And be it further enacted*, That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such

township plats. The commissioner shall direct the United States Surveyor-General for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the General Land Office for approval: *Provided*, That in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land. In case such State surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the commissioner shall direct the Surveyor-General to make segregation surveys, upon application to said Surveyor-General by the Governor of said State within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the General Land Office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said State shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right to the same, shall be determined by testimony to be taken before the Surveyor-General, who shall decide the same, subject to the approval of the Commissioner of the General Land Office."

We submit that the court below erroneously construed these provisions. The opinion of the Supreme Court of California is seen at pp. 45, 46, 47, of the Transcript, from which we quote as follows:

"The defendants are in possession of the demanded premises, and hold United States patents for the same. But it is claimed on behalf of the plaintiff that before defendants acquired any right or title to said land the title to it had passed out of the United States and become vested in the State of California. The grounds of this claim, as stated by one of appellant's counsel, are as follows: 'That on July 1, 1862, he (plaintiff) acquired the title of the State to the land in controversy; that the State had, prior to July 23, 1866, selected this land as swamp land, and had disposed of the same to purchasers in good faith under her laws; that due notice had been given to the United States Land Department of this selection; that within the time required by the act of Congress of March 12, 1860, and before 1866, the State had segregated these lands as swamp; and that, under due and regular proceedings had under the fourth section of the act of 1866, this segregation was approved by the United States Land Department, and the tracts here claimed designated swamp on the United States plat of the towhship.'

"The clause of the fourth section of the act of 1866, to which reference is made, reads as follows:

"'That in all cases where township surveys have been made or shall hereafter be made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California as

swamp and overflowed all the lands represented as such upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats.

"'The Commissioner shall direct the United States Surveyor-General for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly and forward to the General Land Office for approval.'

"It is not claimed that 'the Commissioner of the General Land Office has ever certified over to the State of California as swamp and overflowed' any of the land in controversy. If he had it would be equivalent to a patent, and an action of ejectment might be maintained upon it against any one in possession under a subsequently acquired title. As it is the defendants are in possession, claiming title under United States patents, which purport to convey the entire premises. And the question is, can the plaintiff maintain this action upon the title which he has acquired from the State, without showing that the land has been certified over to the State as swamp and overflowed? Counsel for appellant insist that although said land has never been certified over to the State according to the requirement of said act of Congress the title to said land, nevertheless, became vested in the State. If that be so, the clause which requires the Commissioner to certify over to the State as swamp and overflowed all the lands represented as such, upon such approved plats within one year from the passage of said act, or within one year from the return and approval of such township plats, is superfluous. The act of September 28, 1850, contains a clause somewhat similar to this, and the construction which was given to it by the Supreme Court of the United States in French vs. Fyan (93 U. S. 169) seems to us to militate against the position which appellant's counsel seek to maintain in this case. The act made it the duty of the Secretary of the Interior, as soon as practicable after its passage, to make out an accurate list and plats of the land described in said act, and to transmit the same to the Governer of the State, and at his request to cause a patent to issue to it, and that thereupon the fee simple to said lands should vest in the State. In French vs. Fyan, *supra*, the court held that the issuance of a patent to the State concluded the question of the character of the land, and that parol evidence to prove that it was not swamp and overflowed was, in an action at law, inadmissible. That the law devolved upon the Secretary 'the duty, and conferred on him the power of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was controlling.'

"In Johnson vs. Towsley (13 Wall. 72), the same court said: 'That when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of this tribunal, within the scope of its authority, is conclusive upon all others.'

"Section 4 of the act of July 23, 1866, makes it the duty of the Commissioner in certain specified cases to certify lands over to the

State. And it seems to be left to him to decide in each case whether or not it is a proper one for the exercise of that power. The most that can be claimed on behalf of appellant is that the Commissioner has not performed his duty in this case. The law makes it the duty of the Commissioner to certify over such lands within a specified period, but does not provide that in the event of his failing to, the title to such lands shall vest in the State. And we are unable to find anything in said section 4 which impresses us as indicating that such was the intention of Congress.

"But it is claimed on behalf of appellant that said section 4 must be read in connection with section 1 of the same act, which confirms to the State lands selected by her in part satisfaction of any grant, and under her laws disposed of to purchasers in good faith.

"In Sutton vs. Fassett (51 Cal. 12), the court said: 'The first section of that act does not relate to lands which had been segregated by the State as swamp and overflowed lands. The only section which purports to grant to the State—or in other words to confirm such segregation—is the fourth section.' And that appears to us to be a reasonable construction of the language of said first section. It only applies to selections made of any portion of the public domain 'in part satisfaction of any grant made to said State by any act of Congress.' This would seem to have reference to grants of specific quantities and not to a grant of an indefinite quantity. There would be no propriety in saying that the State accepted any number of acres of swamp land in part satisfaction of the grant of all the swamp land in the State. But in the cases of grants for school and improvement purposes where the quantities are limited and defined, deductions could be made, and it is expressly provided in said first section: 'That the State of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law.'

"We therefore conclude that the title to the demanded premises has never vested in the State, and that the State could not convey a title to the appellant upon which he could maintain an action of ejectment against persons in possession of said premises under patents from the United States."

The court appears to have based its opinion in part upon the decision in Johnson vs. Towsley, reported in 13th Wallace at page 72; but we see no analogy between that case and the one at bar, for the reason that in that case the law provided that when controversies arose between settlers upon the public lands they should be heard and determined by the district officers or by the Commissioner of the General Land Office, whose decision should be final unless an appeal was taken. But if our views are correct, section 1 of the act is applicable to lands that had been selected and sold by the State as swamp and overflowed lands, and by the act were confirmed to the State; this was a grant *in presenti*, and passed the title to the State, and when the boundary lines of these swamp lands were definitely fixed the title by relation took effect as of the date of the original act, ~~July 23, 1866~~, except as to those portions to which "ad-

verse pre-emption, homestead, or other right had attached at the date of the passage of the act."

By reference to Section 4 of the act it will be seen that in all cases where township surveys were made under authority of the *United States* it became the duty of the Commissioner of the General Land Office to certify over to the State of California as swamp and overflowed all the lands represented as such on such approved plats. The Commissioner should also direct the *United States Surveyor-General for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State,* and where they *conformed to the system of surveys adopted by the United States,* the U. S. Surveyor-General for California was required to construct and *approve* township plats accordingly and forward to the General Land Office for approval.

Soon after the passage of this act Commissioner Wilson wrote to Surveyor-General Upson a letter of instructions under the provisions of the act, which appears not to have reached the Surveyor-General's office until 1871. A copy of the letter was submitted in evidence and appears in full on pages 14, 15, and 16, inclusive, of the Transcript.

On the 8th of August, 1871, Commissioner Drummond sent to the United States Surveyor-General for California a letter of instructions, from which we quote: "Referring again to my letter of the 7th ult. in relation to the examination of the segregation maps and surveys of swamp and overflowed land made by the State of California and the construction of township plats by you in accordance with the provisions of the fourth section of the act of Congress of July 23, 1866, * * * which reads as follows: 'The Commissioner shall direct the Surveyor-General of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State, and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township maps accordingly,' I have deemed it best to submit the question to the Honorable Secretary of the Interior * * * and secure his opinion and decision." This letter is given in the transcript at pages 17 and 18.

Commissioner Drummond then addressed a letter to the Hon. Columbus Delano, Secretary of the Interior, in which he makes the following inquiries: "First. Do the words, 'System of surveys adopted by the United States' * * * refer to or mean the ordinary rectangular system of surveys adopted by the United States and embodied in a work published by the General Land Office, entitled 'A Manual of Surveying Instructions,' and made a part of each contract for surveying by the second section of an act of Congress approved May 30, 1862, entitled 'An act to reduce the expenses of the survey and sale of the public lands in the United States?'

"Second. If such words refer to such rectangular system of surveys, *are the lands segregated by the State of California prior to July 23, 1866, where the surveys conform to such system, confirmed* to the State of California by said act of July 23, 1866?" A copy of this entire letter is contained in the transcript at pages 18 and 19.

The Secretary of the Interior referred the last-named letter to the

Hon. W. H. Smith, Assistant Attorney-General, who wrote a very exhaustive and argumentative opinion, and concludes by making a direct answer to the questions propounded, as follows:

"First. The words, 'system of surveys adopted by the United States' as used in said section 4 do mean the ordinary rectangular system of surveys adopted by the United States and embodied in the manual referred to.

"Second. The lands segregated by the State of California prior to July 23, 1866, by surveys made in conformity with such rectangular system, and to which there was no adverse claim *were* confirmed to the State by the act of July 23, 1866, in all townships which had been surveyed by the United States prior to that date."

This opinion is given in the Transcript from page 18 to page 27 inclusive.

The Secretary of the Interior then addressed a letter to the Commissioner of the General Land Office in answer to the Commissioner's letter of the 16th of August, in which the Secretary says:

"I have arrived at the following conclusions—

"1. That the first three sections of said act relate to lands which have been disposed of by the State to purchasers in good faith under her laws, and confirm to the State all such selections, except in the cases named in the proviso to the first section.

"2. That the fourth section secures to the State, as swamp and overflowed, all lands that are represented as swamp on the approved plats of *United States* surveys that had been made prior to July 23, 1866.

"That section required the United States Surveyor-General for the State of California to examine the segregation maps and surveys of swamp lands made by said State, and when he should find such maps in townships which had been surveyed by the United States prior to July 23, 1866, to conform to the rectangular system of surveys prescribed by the United States, he was *required* to construct and approve township plats in accordance with such surveys; *that the practical result of such approval was to secure to the State all the lands represented as swamp* on such State segregation maps and surveys as to which there was no adverse claim.

"That the Surveyor-General, in the examination of segregation maps which he should find conformed to the rectangular system in townships which had been surveyed by the United States prior to July 23, 1866, and as to which there was no adverse claim, should not take into consideration the quality of the land embraced in such segregation surveys, but should treat them as swamp, whether they were so in fact or not.

"You will take all the necessary steps to carry the foregoing views into execution.

"I transmit herewith an opinion on this subject prepared by Hon. Walter H. Smith, Assistant Attorney-General. In the conclusions arrived at by Mr. Smith, I fully concur." (Transcript, pp. 27, 28.)

It will readily be seen that the opinion of the court below is in direct conflict with the views expressed by the U. S. Attorney-General, the Secretary of the Interior, and the Commissioner of the

General Land Office, and as we shall show, antagonistic to the recognized rules of the land departments, both State and national. We submit that the views and instructions embodied in the letters above referred to are in harmony with and supported by the following decisions: In Stoddard vs. Chambers (2 Howard U. S., 284) this court said:

"*A confirmation, by act of Congress, vests in the confirmee the right of the United States, and a patent, if issued, could only be evidence of this. On a title by estoppel, an action of ejectment may be maintained.*

"If the claim of the defendant had not been interposed, no one could doubt the validity of the plaintiffs' title. *It has the highest sanction of the Government, an act of legislation.* But the 2d section of the act of 1836, which gave this sanction, provided 'that if it should be found that any tract confirmed, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed or sold by the United States, that act should confer no title to such lands, in opposition to the rights acquired by such location or purchase.'

"This provision, it is insisted, covers the case, and defeats the title of the plaintiffs. *But it must be observed that a location, to come within the section, must have been made "under a law of the United States." Now an act under a law means in conformity with it; and unless the location of the defendant shall have been made agreeably to law, or the patent were so issued, the reservation does not affect the title of the plaintiffs.*

"The holder of a New Madrid certificate had a right to locate it only on 'public lands which had been authorized to be sold.' Peltier's location was made in 1816, and his survey in 1818. The location of Coontz was made in 1818, and his survey in 1818. At these dates there can be no question that all lands, claimed under a French or Spanish title, which claim had been filed with the recorder of land titles, as the plaintiffs' claim had been, were reserved from sale by the acts of Congress above stated. This reservation was continued up to the 26th of May, 1829, when it ceased, until it was revived by the act of the 9th of July, 1832, and was continued until the final confirmation of the plaintiffs' title, by the act of 1836. The defendant's patent was issued the 16th of July, 1832. So that it appears that when the defendant's claim was entered, surveyed, and patented, the land covered by it, so far as the location interferes with the plaintiffs' survey, was not 'a part of the public land authorized to be sold.'

"On the above facts the important question arises whether the defendant's title is not void. *That this is a question as well examinable at law as in chancery, will not be controverted. That the elder legal title must prevail in the action of ejectment is undoubted. But the inquiry here is, whether the defendant has any title, as against the plaintiffs.* And there seems to be no difficulty in answering the question, that he has not. His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. Had the entry been made, or the patent issued, after the 26th of May, 1829, when the reservation ceased, and

before it was revived by the act of 1832, the title of the defendant could not be contested. But at no other interval of time, from the location of Bell until its confirmation in 1836, was the land claimed by him liable to be appropriated in satisfaction of a New Madrid certificate.

"No title can be held valid which has been acquired against law; and such is the character of the defendant's title, so far as it trenches on the plaintiffs'. *It has been argued that the first patent appropriates the land, and extinguishes all prior claims of inferior dignity. But this view is not sustainable.* The issuing of a patent is a ministerial act, which must be performed according to law. *A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual.* The fee having been vested in the patentee by the first patent, the record could convey no right. It is true a patent possesses the highest verity. It cannot be contradicted or explained by parol, but if it has been fraudulently obtained, or issued against law, it is void. It would be a most dangerous princip e to hold, that a patent should carry the legal title, though obtained fraudulently or against law. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent. The patent of the defendant having been for land reserved from such appropriation, is void; and also the survey of Coontz, so far as either conflicts with the plaintiffs' title. For the foregoing reasons, we think the instructions of the court to the jury were erroneous; and, consequently, the judgment must be reversed at the defendant's cost, and a *venire de novo* is awarded."

The case of the Railroad Company vs. Fremont county (9th Wallace, p. 89) is in many respects analagous to the one at bar. On the 3d of March, 1857, Congress passed an act to confirm to the several States the swamp lands selected under the several swamp land grants, so far as the same remained vacant and unappropriated and not interfered with by actual settlement *under any existing law* of the United States (11th U. S. Statutes, 251). Subsequent to the passage of this act (May 15, 1856), Congress granted to the State of Iowa certain lands for the purpose of aiding in the construction of designated railroads. We quote from the statement of that case:

"In this connection it may be proper to refer to the act of March 2, 1855, which is 'An act for the relief of purchasers and locators of swamp and overflowed lands.' It provides, in substance, that patents shall be issued to purchasers or locators who had made entries of the public lands claimed as swamp lands prior to the issue of patents to the States under the second section of the swamp-land grant of 1850, and providing for an indemnity to the States. Conflicts had arisen between these purchasers and locators, on the one side, and the States claiming the land under the swamp-land grants. As these lands were not withdrawn from sale till the filing of the lists in the local land office, they were suppos d to be open to entry or location, and a portion of them had been thus appropriated. On the other hand, the States claimed that the grant to them by the act of Congress was a grant *in presenti* and vested the title immediately. Such had been

the opinion expressed by the land commissioner, and also by the Attorney-General.

"The embarrassments of the land department growing out of this controversy between the States and the settlers were removed by this act of 1855, which confirmed the title of the settlers, and compensated the States for the land of which they were deprived.

"The second section of the act provided that compensation should be allowed to the States only in respect to subdivisions taken up by the settlers which were swamp lands within the true intent and meaning of the act of 1850; that is, where the greater part were 'wet and unfit for cultivation.' And the land department, therefore, allowed parties to contest the claim of the States, and to give evidence before the proper officers that the subdivision was not of the character contemplated by the law. As a consequence, under this construction of the act, controversies increased between the settlers and the States, and, as stated by one of the commissioners of the land office, the contesting applicants pending before the department involved, by estimate, three millions of acres, and, on investigations being ordered, papers came into the office by bushels. Pending these proceedings Congress intervened and passed the act of March 3, 1857. This act is entitled 'An act to confirm to the several States the swamp and overflowed lands selected under the act of September 28, 1850, and the act of March 2, 1849.'

"The act contains but one section, and it provides 'that the selection of swamp and overflowed lands granted to the several States by the act of Congress, approved September 28, 1850, and the act of March 2, 1849, heretofore made and reported to the Commissioner of the general land office, *so far as the same shall remain vacant and unappropriated, and not interfered with by any actual settlement under any existing laws of the United States*, be, and the same are hereby confirmed, and shall be approved and patented to the several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable,' with a proviso saving the act of March 2, 1855, which is continued in force and extended to all entries and locations claimed as swamp land made since its passage. As we have already stated, the selection of the swamp and overflowed lands by the State of Iowa, under instructions from the land department, involved in this suit, was made and lists returned and filed in the department September 20, 1854, and January 21, 1857, which was before the passage of this act. And these are the selections referred to, confirmed and approved, and for which patents were directed to be issued as soon as practicable, if the same were vacant and unappropriated, or not occupied by an *actual settler under some law of Congress*."

Mr. Justice Nelson, in delivering the opinion of the Court, said:

"But there is still, if possible, a more decisive answer to the title set up by the defendants. Until the line of the railroad was definitely fixed upon the ground, there could be no certainty as to the particular sections of land falling within the grant; nor could the title to any particular section on the line of the road vest in the company. The grant was in the nature of a float until this line was permanently fixed. Now the proofs show that the location of the road was not

made on the ground and adopted by the company till the 24th of March, 1857, which was after the confirmatory act of that year.

"*This, as we have seen, confirmed all the selections made at the time, and which included all in controversy in this suit, in the language of the section, 'so far as the same shall remain vacant and unappropriated, and not interfered with by actual settlement.'*"

On the 23d of July, 1866, Congress passed an act for a grant of lands to the State of Kansas to aid in the construction of the Northern Kansas railroad. (14th U. S. Statutes, 210.)

The first section of the act declares: "That there is hereby granted to the State of Kansas for the use and benefit of the St. Joseph & Denver City Railroad Company every alternate section of land designated by odd numbers for ten sections in width on each side of the road. But if, when the line of the road should be definitely fixed, any pre-emption or homestead right should have attached to said odd-numbered sections, other lands are to be selected in lieu thereof."

Section 4 of the act provides that as soon as the company shall file with the Secretary of the Interior maps of its lines, it shall be his duty to withdraw from market the lands granted by the act.

On the 25th of March, 1870, the company referred to in the act filed with the Secretary of the Interior a map of the line of its road. It seems that one Van Wyck, on the 13th of April, 1870, located lands within the railroad limits, and on the 15th of November, 1871, received a patent for the same. One Knevals acquired from the company all its interest in the lands located by Van Wyck, for which he, Van Wyck, had received a patent.

Knevals filed his bill against Van Wyck in the U. S. Circuit Court for the District of Nebraska. The case was brought to this court on appeal, and the opinion was delivered by Mr. Justice Field, in which he says:

"The grant is one *in presenti*, except as its operation is affected by that condition. [That is, it should not embrace lands to which pre-emption or other rights had attached.] The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of *identification* until the route of the road is definitely fixed. *When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of Congress.* * * * No further action is required of the company to establish the route. It then becomes the duty of the Secretary to withdraw the lands granted from market. *But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others.*" (Van Wyck vs. Knevals, 16th Otto, 360.) See also French vs. Fyan, 93 U. S., 170; Railroad Company vs. Smith, 9 Wallace, 99, and Stark vs. Starrs, 6 Wallace, 402.

We think the foregoing views and decision not only tend to show, but do in fact conclusively show, that the title to the lands in controversy passed to the State of California and its grantees by the act of July 23, 1866, unless the defendants have brought themselves within the exceptions made in the first section of the act (which we shall consider further on), even though the Commissioner of the General

Land Office and the United States Surveyor-General had neglected to perform the ministerial acts as directed by the fourth section. Section 3 of the act has no direct bearing upon the case at bar, referring only to lands which *had not* been surveyed by authority of the United States prior to July 23, 1866, but these lands had been so surveyed. The following evidence shows that the law was substantially complied with by the State:

Plaintiff introduced in evidence Certificate of Purchase No. 1659 from the State of California to J. W. Tuttle for Swamp Land Survey No. 588, being the southeast quarter and south half of northeast quarter of section 24, and the east half of section 25, all in township 11 north, range 2 east, Mount Diablo meridian, in which certificate said lands are described as swamp and overflowed lands, granted by the United States to the State of California by act of Congress of September 28, 1850. Said certificate bears date July 1, 1862, and was duly assigned to plaintiff on the 14th day of January, 1864.

Plaintiff then introduced in evidence Certificate of Purchase No. 1660 from the State of California to W. H. Alvis for Swamp Land Survey No. 592, being the east half and southwest quarter of Section 36, and the southeast quarter of Section 35, all in township 11 north, range 2 east, Mount Diablo meridian, in which certificate said lands are described as swamp and overflowed lands granted by the United States to the State of California by act of Congress of September 28, 1850. Said certificate bears date July 1, 1862, and was duly assigned to plaintiff on the 10th of July, 1862.

Plaintiff then introduced in evidence a duly certified copy of the plat of the township in which the lands in controversy are situated, approved by L. Upson, U. S. Surveyor-General for California, on the 10th of January, 1866, on which plat the east half of the northeast quarter of said section 25 was designated as swamp and overflowed land, but none other of the lands in controversy were so designated.

Plaintiff then introduced in evidence the plat of said township approved by J. R. Hardenbergh, U. S. Surveyor-General for California, on the 4th of April, 1872, on which map all the lands in controversy are designated as swamp and overflowed lands. Upon said plat is endorsed the following certificate:

"The above map of Township No. 11 north of range 2 east, of Mount Diablo meridian, represents the amendments made to the map of this township approved January 10, 1866, in strict conformity

"1st. With the segregation of swamp and overflowed land made by the State of California east and north of Sacramento river, as shown on plat of swamp and overflowed lands in the counties of Sutter and Placer, approved November 15, 1861, by H. A. Higley, Surveyor-General and ex-officio Register State land office, and

"2d. With the segregation of swamp and overflowed land south and west of Sacramento river, as the same was sworn to have been made by Amos Mathews, County Surveyor of Yolo county, in August, 1862, in accordance with the laws of the State of California, and as the same is represented on said Mathews' plat.

"The certified copies of both plats, filed by the State of California in this office, show that the two segregations conform to the system of surveys adopted by the United States.

U. S. Surveyor-General's Office,
San Francisco, April 4, 1872.

J. R. HARDENBERGH,
U. S. Surv.-Gen. Cal."

The copy of said map had endorsed upon it the following certificate:

U. S. SURVEYOR-GENERAL'S OFFICE,
SAN FRANCISCO, CAL.

"I, James T. Stratton, Surveyor-General of the United States for California, hereby certify that this is a correct copy of the original plat on file in this office, and a correct copy of the certificate of the Surveyor-General endorsed thereon, and the whole thereof. And I further certify that said certificate is, in substance, the certificate of approval on all township plats made and approved in pursuance of section 4 of the act of Congress approved July 23, 1866, entitled 'An act to quiet land titles in the State of California.'

"Attest my hand and the seal of this office this 20th day of November, A. D. 1875.

[SEAL.]

JAS. T. STRATTON,
U. S. Surv.-Gen. Cal."

Plaintiff then introduced in evidence a copy, duly certified by Robert Gardner, Surveyor-General of the State of California, of a map on file in said office, entitled "Supplemental Segregation of Swamp and Overflowed Land in Yolo County; segregated by Amos Mathews, County Surveyor;" on which plat all of the lands in controversy are designated as swamp and overflowed lands.

Plaintiff then introduced in evidence a copy of a duly certified copy of said segregation map, on which copy, so introduced, is endorsed the following certificate:

"U. S. SURVEYOR-GENERAL'S OFFICE,
SAN FRANCISCO, CAL.

"I hereby certify that this diagram has been compared with the original by me; and that the same is a correct transcript of a plat embracing Townships 11 N., R. 2 E.; 12 N., 2 E.; 12 N., 1 E. (fractional), and 11 N., 1 E., Mount Diablo meridian, said plat having been filed in this office between the 22d of March and 4th of April, 1872; and being plat of survey made by the County Surveyor of Yolo county under and in pursuance of the Statutes of California then in force, and showing the segregation lines of the swamp and overflowed lands in said townships; and further that the whole of that portion of said plat is designated thereon as swamp and overflowed land; that I have compared the certificate of approval of said plat with the original endorsed thereon, and that the same is a full, true, and correct transcript thereof.

"Witness my hand and the seal of this office, this 22d day of September, A. D. 1873.

[SEAL.]

J. R. HARDENBERGH,
U. S. Surv.-Gen. Cal."

Plaintiff then introduced in evidence a duly certified copy of the following letter transmitted by J. F. Houghton, Surveyor-General and ex-officio Register of the State Land Office, to L. B. Ayer, Register of the U. S Land Office at Marysville, Cal., on the 15th day of June, 1867, together with the list of lands annexed thereto and referred to therein; which list included all the lands in controversy:

"State of California, Office of Surveyor-General and Register of the State Land Office, Sacramento, June 15, 1867.

"To L. B. Ayer, Register U. S. Land Office for the Marysville Land District: I hereby notify you that all the lands described in the annexed list, had, prior to the 23d day of July, A. D. 1866, been selected and disposed of to purchasers in good faith by the State of California, under her laws, as swamp and overflowed lands.

[SEAL.] [SEAL.] J. F. HOUGHTON,
Surv.-Gen. and Register."

Plaintiff then introduced in evidence a duly certified copy of the certificate of survey of J. W. Tuttle, for Swamp Land Survey No. 588, filed in the Surveyor-General's Office October 7, 1861, and approved November 2, 1861, and upon which said certificate of purchase No. 1659 was issued. Said certificate of survey was in due form, and had annexed thereto the affidavits prescribed by law.

Plaintiff then introduced in evidence a duly certified copy of the certificate of survey of W. H. Alvis, for Swamp Land Survey No. 592, filed in the Surveyor-General's Office October 7, 1861, and approved November 2, 1861, and upon which said certificate of purchase No. 1660 was issued. Said certificate of survey was in due form, and had annexed thereto the affidavits prescribed by law.

E. Twitchell was then sworn as a witness for plaintiff, and testified as follows: "I am a clerk in the State Land Office. I was employed in the Surveyor-General's Office first in February, 1858, and remained there until 1863. I was then absent until December, 1867, when I came back and have been employed in one or other of those offices ever since. In the winter of 1862, or the spring of 1863, I am not certain which, Amos Mathews, the County Surveyor of Yolo County, filed in the Surveyor-General's Office the map called "Supplemental Segregation of Swamp and Overflowed Land in Yolo County; segregated by Amos Mathews, County Surveyor." I saw him bring the map there and deposit it in the office. This is that map." (Here the witness exhibited the map, being the map of which certified copies had theretofore been introduced in evidence, but which map contained no endorsement or filing.) Plaintiff then asked the witness the following question: "Since that time has it, or has it not been recognized as the Segregation Map of Yolo County by the Surveyor General of this State, and acted upon by him as such, and by the Land Officers as such, by the Surveyor General and Register of the State Land Office as such?" Counsel for the defendants objected to the question on the ground that the same was immaterial, irrelevant and incompetent, and the Court sustained the objection; to which ruling the plaintiff by his counsel, then and there duly excepted. The witness, resuming, then testified as follows: "This map has remained

in the archives of that office ever since. No other segregation map of these lands was ever in the office. There was another map called the Original Segregation Map made by Wm. Minis, a former County Surveyor, which did not embrace these lands for the reason that they were then supposed to be included in a platted Mexican Grant, and were therefore not segregated." (Transcript pages 10 to 14.)

Plaintiff then introduced said map in evidence.

Upon this and other evidence given in the transcript, the Court in which the action was originally commenced, filed its decision on the 8th day of September, 1876, in accordance with the facts established by the evidence. By the 11th finding (Transcript page 6) the court decided that the south half of the northeast quarter of section 36, in suit, containing 80 acres, the northeast quarter of the northeast quarter of section 25, containing 40 acres; and the northwest quarter of the southeast quarter of section 24, containing 40 acres, were on the 28th of September, 1850, swamp and overflowed lands, within the meaning of the act of Congress of that date, and as such were granted to the State. It will thus be seen that in making this decision, the Court did not de ide in accord nce with the segregation lines made by authority of the United States nor those made by the State, and disregarded the act of July 23, 1866.

Upon the findings of facts (Transcript, pages 4 to 6), judgment was entered in favor of plaintiff for the lands which the court, as above shown, found to be swamp lands under the act of 1850. (Transcript, pages 8 and 9.) But the court failing to find whether or not the plaintiff was the owner of the other lands in controversy, the plaintiff moved the court for a new trial, which being denied, he appealed to the Supreme Court of the State of California, and on the 20th day of December, 1877, the said Supreme Court entered its judgment directing the court below upon the evidence already taken, and such other evidence as might be introduced, to find upon the facts as above suggested (Transcript, page 9.)

Afterwards, on the 19th day of May, 1879, the said cause came on for hearing upon additional evidence to be offered in pursuance of said judgment of said Supreme Court, whereupon the following proceedings were had:

Plaintiff introduced in evidence a copy of the plat of said township, approved by U. S. Surveyor-General Hardenbergh April 4th, 1872, which plat was identical with that theretofore given in evidence, with the addition of the following certificate:

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., January 12th, 1874.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed copy of the plat of township 11 north, range 2 east, of Mount Diablo meridian, received with the Surveyor-General's letter of April 19, 1872, and since which time it has been officially used as approved plat, made in accordance with

section 2488 U. S. Revised Statutes, is a true and literal exemplification of said plat, bound in California plat book No. 180 in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be annexed at the city of Washington, on the day and year above mentioned.

[SEAL.] J. A. WILLIAMSON,
Commissioner of General Land Office.

Plaintiff also introduced in evidence a copy duly certified by the U. S. Surveyor-General for California, of the following letter:

U. S. SURVEYOR-GENERAL'S OFFICE,
SAN FRANCISCO, April 19, 1872.

HON. WILLIS DRUMMOND,
Commissioner General Land Office, Washington, D. C.

SIR: I transmit in a separate roll by to-day's mail certified plats, also certified descriptive lists of the following townships, showing all tracts which the State of California claimed as swamp and overflowed prior to July 23, 1866; also showing the segregation of swamp and overflowed lands made by the United States, viz.: Township 11 north, range 1 east; township 11 north, range 2 east; township 12 north, range 2 east, Mount Diablo meridian. The lists of said tracts contain annotations in red ink made by the register of the U. S. land office at Marysville, stating all titles to said lands adverse to the claims of the State of California, together with the register's certificate testifying to the correctness of such annotations, as appears from the records of this office.

These plats and lists are sent you in accordance with the instructions contained in your letter of July 7, 1871, which enclosed for my guidance a copy of a letter addressed to L. Upson, U. S. Surveyor-General, dated Sept. 13th, 1866.

Very respectfully, your obedient servant,

J. R. HARDENBERGH,
U. S. Surv.-Gen. Cal."

It will be seen by reference to the transcript that all the documentary evidence offered at the trials was duly and properly authenticated. After plaintiff had rested his case, defendant offered documentary evidence; and against plaintiff's objections it was admitted by the court, to which ruling plaintiff excepted. The evidence so offered by defendant is contained in the transcript from the last paragraph on page 32 to the first paragraph on page 40, inclusive.

All reference to the evidence and exceptions referred to in this brief are found in plaintiff's bill of exceptions as settled by the court, embracing pages 10 to 41, inclusive. The assignment of error contained in said bill of exceptions is on pages 40 and 41, and is as follows:

To the introduction in evidence of each of said documents plaintiff objected, on the ground that the same were severally immaterial and irrelevant, and on the further ground that each of said documents consisted of matter not admissible in evidence under the answers of

defendants, to-wit, a former adjudication, which should have been specially pleaded. Said objections were overruled by the court, and each of said documents were admitted in evidence; to which several rulings plaintiff then and there excepted.

The above and foregoing is all the evidence given upon the several trials of the said cause.

And thereafter, to-wit, on the 13th day of December, 1879, the court filed its findings of fact and conclusions of law; to which decision plaintiff duly excepted, and now excepts, on the following grounds:

I.

The evidence is insufficient to justify the finding of the court to the effect that plaintiff is not, and never was, the owner, nor entitled to, the possession of all or any part of the lands described in the complaint, in this, that the evidence shows that said lands were, on the 28th day of September, A. D. 1850, swamp and overflowed lands, made unfit thereby for cultivation, within the meaning of the act of Congress of that date, and remained unsold at the date of said act, and were by said act granted to the said State of California; and that the title of said State thereto had vested in plaintiff, and still remained so vested; and for the further reason that the evidence showed that said lands were granted to the said State of California by the act of Congress of July 23, 1866, entitled 'An act to quiet land titles in California," and that the title of said State thereto had vested in plaintiff, and still remained so vested; and for the further reason that the evidence showed that plaintiff was, at the commencement of this action, the owner in fee and entitled to the possession of all of said lands.

II.

The evidence is insufficient to justify the finding of the court that all and singular the allegations of plaintiff's complaint are untrue, for the reasons set forth in the first specification herein, and for the reason that the evidence showed that, at the commencement of this action, defendants were in possession of the lands described in said complaint, and withheld the possession thereof from p'aintiff.

III.

The evidence is insufficient to justify the finding of the court to the effect that the allegations of defendants' respective amended answers are true, for the rea ons stated in the first and second specifications herein, and for the reason that the evidence showed that plaintiff was seized of the whole of said premises within five years next before the commencement of this action.

IV.

The decision of the court is against law, in this, that by the judgment of the Supreme Court, hereinbefore referred to, said District Court had authority to find only upon the issues set forth in said judgment of said Supreme Court, and not to set aside its findings upon the other issues in said cause, or to find contrary thereto.

And plaintiff specifies the following errors in law occurring at the

trial and excepted to by the plaintiff, upon which he will rely in his motion for a new trial herein:

1. The court erred in sustaining defendants' objection to the question asked by plaintiff to the witness Twitchell, and in refusing to permit said question to be answered.

2. The court erred in overruling plaintiff's objections to the admission in evidence of the documents offered by defendants at the last hearing of said cause, and of each of them, and in admitting said documents, or any of them, in evidence against plaintiff's said objections.

W. B. TREADWELL AND
C. P. SPRAGUE,
Attorneys for Plaintiff.

The foregoing bill of exceptions, together with the amendments thereto, having been duly presented to me, I have allowed certain of said amendments, and disallowed others; and the said foregoing bill has been, this day, settled and allowed, and is correct and true.

Dated July 27, 1880.

S. C. DENSON,
Ex-District Judge.

Endorsed: Filed July 28, 1880. J. K. Smith, clerk, by Jos. La Busier, deputy.

We will not spend the time fully to discuss the errors assigned as to the admission or rejection of evidence. The question asked was as to whether or not since the depositing of the segregation map made by the State and deposited in the State land office in 1862 or 1863, it had been recognized as the segregation map of Yolo county by the Surveyor-General of the State and acted upon by him as such and by the Surveyor-General and Register of the State land office. In rejecting the testimony the learned judge acted upon the theory that the deposit of a document was of no effect unless it had marked upon it in writing the evidence of its having been filed. But neither the State nor the Congressional act required that anything more should be done than to construct the plat and deposit and act upon it.

All the documentary evidence offered by defendant at the last trial of the cause consists of a letter from the Surveyor-General of the State of California to the Commissioner of the General Land Office, bearing date of July 6, 1877 (Transcript, p. 33); a letter from the Commissioner to said State Surveyor-General dated July 24, 1877 (Transcript, pp. 33-4); a letter from the Secretary of the Interior to said Commissioner, dated January 8, 1879 (Transcript, pp. 34-5); a letter from the U. S. Surveyor-General for California to the Commissioner of the General Land Office, dated March 9, 1870 (Transcript, pp. 35-7); and a letter from the Commissioner of the General Land Office to the Surveyor-General of the State of California, dated April 12, 1870 (Transcript, pp. 38-9).

All this testimony was immaterial for the following reasons: It did not tend to show that the lands were not swamp and overflowed on the 28th of September, 1850, and thereby passed to the State by the swamp land act. It did not tend to show that the lands in controversy

were not within the swamp land segregation made by the State. It did not tend to show that the defendants had ever become possessed of the lands under any law of Congress or of the State. It did show that the entire correspondence and the acts referred to therein were subsequent to the disposal of the lands by the Government, and the matters in controversy had passed beyond the jurisdiction of the executive department and could only be adjudicated by the proper judicial tribunals.

We think we have shown from the opinions and decisions hereinbefore referred to, and from which we have quoted, that the title to the lands in controversy passed to the State of California by the act of the 28th of September, 1850, and the act of the 23d of July, 1866, unless the defendants have brought themselves within the exceptions mentioned in the act.

To make the lands in controversy fall within the exceptions provided for in section one of the act of 1866, they must have been *selected* by the State *contrary* to existing laws. They were selected by the State, under and in pursuance of the act of Congress of March 12th, 1860, cited on page two of this brief, and in pursuance of the legislative act of May 13th, 1861, and were not selected *contrary* to existing laws. If not, they were confirmed to the State. Long before the defendants entered upon or claimed settlement of these lands, a map of the selection was deposited in the State Land Office, and the United States District Land Office had notice of such selection as *shown by the evidence.*

The defendant, Roseberry, claimed to be the owner of the southeast quarter of section 25, and the northeast quarter of section 36. Had any adverse pre-emption, homestead, or other right been acquired by Roseberry *under the laws of the United States* prior to July 23d, 1866(?) His claim to the northeast quarter of section 36, is as follows: On the 2d day of September, 1864, one Geo. Bolin filed a declaratory statement in the U. S. Land Office, in the district where the land is situated, and received a patent therefore on the 20th of February, 1868. On the 1st day of January, 1871, nearly a year after the commencement of this action, said Bolin deeded said northeast quarter of said section 36 to the defendant Roseberry. These circumstances did not give Roseberry nor his grantors any rights under any law of the United States,

First, because Congress had on the 3d of March, 1853, granted to the State of California, said section 36 by the act of that date, cited on the first page of this brief, and we know of no law that would have authorized Mr. Bolin to settle upon said section, and even if it had not been previously granted to the State he could have acquired no right by reason of such settlement, because there is no pretense that the settlement was made within one year from the date of the last-named act, the language of which is: "Nor shall any right of such settlers be recognized by virtue of any *settlement or improvement* made of such unsurveyed lands subsequent to that day. Nor was the settlement made within two years from the date of the amendatory act of March 1, 1854.

Defendant Roseberry's claim to the southeast quarter of section 25 is based upon his declaration of pre-emption filed in the U. S. District land office in 1864, and his patent from the United States in June, 1866 (Transcript, pp. 29-30). We submit that he acquired no rights thereby:

First, because the east half of said quarter section, as conclusively shown by the evidence, was swamp and overflowed land and so designated by the survey made and approved by authority of the United States, and being so designated the fact became a finality, and the title passed to the State by the act of 1850, as we think we have clearly shown by the authorities before cited.

Second, He acquired no right by reason of settlement as shown by the act of 1853 and of 1854 before cited.

Third, He acquired no right by reason of his declaratory statement, because it was made and filed two years before the United States map of the survey was made and approved. Upon this last proposition we refer to Daniels vs. Lansdale. In that case the plat of the survey was filed with the Regis er of the pr per land office *on the 26th day of April, 1856;* Lansdale filed his declaratory statement before that date, *i. e.,* on the 20th day of February, 1856; Daniels filed *his* declaratory statement *October 11, 1858.* The pre-emption rights of the respective parties were contested before the Register of the District Land Office, and the Secretary of the Interior, wherein it was decided that the filing of Lansdale was premature and therefore a nullity. Daniels c mmenced his action in ejectment against Lansdale in the District Court of the State of California; the case went to the Supreme Court of the State and in its opinion the Court say: *The defendents declaratory statement was filed before the Surveyor-General had filed the plat of the Survey in the Register's office.* The declaratory statement was filed prematurely and was therefore a nullity." (43 Cal., p. 41,)

This we think effectually disposes of defendant Roseberry's claim to the northeast quarter of section 36, and the southeast quarter of section 25.

The defendant, Permelia Simmons, claims to be the owner of the east half of the northeast quarter, and the southeast quarter of the northeast quarter of section 25. (Transcript, page 4.) We shall consider her claim to each of these parcels separately. She bases her claim to the east half of the northeast quarter of section 25, first, upon an alleged settlement of said land in the year 1857; as we have shown she acquired no rights by reason of said settlement by reference to the Congressional acts of 1853 and of 1854; second, upon a declaratory statement of her husband, filed in the United States Land Office at Marysville, August 23d, 1864. We have also shown that such declaratory statement was a nullity, because it was prematurely filed. Third, to a patent of the United States, dated July 29th, 1871, nearly a year after the commenc ment of this action; and we think we have shown that the title to said land was confirmed to the State by the act of July 23d, 1866. (Transcript, page 30.) The court in which the action was commenced, from the evidence, found as a fact, that

the north forty acres of this eighty acres was swamp and overflowed under the act of the 28th of September, 1850. (11th Finding, Transcript, page 6.) It is true that the court from some motive unknown to us, and perfectly inexplicable to all, without farther evidence as to the character of said land, and without farther argument or suggestion by counsel on either side, subsequently set aside all the findings that had been previously made.

As to the southwest quarter of the northeast quarter of section 25, of which defendant Simmons claims to be the owner, she bases her claim upon nothing. There was not a syllable of evidence that she was in possession of it; that she had ever enclosed it; pre-empted or patented or purchased it from any person whomsoever. The complaint alleges that she took possession of it on or about the 1st of January, 1870. This not being denied is conclusively presumed to be true. She alleges in her answer that she has been in possession more than ten years. Under the rules of practice in California, this allegation is presumed to be denied, and there is no word of evidence to support it. Yet by the excentric judgment of the court, disregarding the act of 1866, awarded this parcel of land to the defendant, Permelia Simmons.

The defendant, Powell, claims to be the owner of the north half of the southeast quarter, and the southeast quarter of the southeast quarter of section 24, otherwise described as the east half and northeast quarter of section 24. She bases her claim; first, upon a declaratory statement of pre-emption made by her former husband on the 11th of July, 1864. As before shown, this declaratory statement was premature and therefore void, second, upon a patent dated November 1st, 1867, to the heirs of her former husband. Even if this land had been subject to pre-emption, at the time the declaratory statement was made, his entry was absolutely void, and the patent was fraudulently obtained; was not obtainad under any law of the United States. He never resided upon the land, never built a dwelling house thereon. So far as his residence is concerned, he might as well have resided in Texas or any other State. The testimony as to the claim of defendant Powell is given at the bottom of page 30 and top of page 31 of the transcript, which shows in itself fraud in the entry of the land. The act of the 4th of September, 1841, which provides for pre-emptions, prescribes as one of the requisites before entry of the land, that a dwelling house must be built thereon and actual residence in person; hence Lippincott, the former husband of defendant Powell, did not enter the land in pursuance of any law of the United States. But the court found as a fact that 40 acres sf this land was swamp and overflowed land on the 28th of September, 1850, within the meaning of the act of that date. (Transcript, page 6, 11th finding.)

As to the statute of limitation plead by the respective defendants, there is no evidence to sustain the allegations. The patents of the United States were all issued within less than five years before the commencement of the action. There was no evidence of five years continuance possession by any of the defendants, except some 15 or

20 acres of the southeast quarter of section 25, by Roseberry. Counsel for defendants never urged in the court in which the action was commenced, nor in the Supreme Court, any claim to the lands by virtue of any statute of limitation, but abandoned that defence, which is not referred to in the Supreme Court decision. The bill of exceptions contains all the evidence given upon the several trials of the said cause, (Transcript page 40).

By reason of the law, and the facts as disclosed by the evidence we submit that plaintiff was, and is, entitled to judgment for the possession of all the lands described in the complaint.

That beyond all reasonable controversy, he is entitled to judgment for the possession of the northeast quarter of section 36, which was granted to the state by the act of March 3d, 1853, if not by the act of September 28th, 1850. Also to the east half of the northeast quarter of section 25, which was designated as swamp land by the survey made by authority of the Government of the United States; also to the southwest quarter of the northeast quarter of section 25, to which neither defendant Simmons, nor the other defendants had or has any color of title.

All of which is respectfully submitted.

C. C. SPRAGUE,
Attorney for Plaintiff in Error.

Service of the within brief admitted this day of January, 1887.

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Attorney for Defendants.

121-488

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 156.

TIERY WRIGHT, PLAINTIFF IN ERROR,

vs.

B. H. ROSEBERRY, FLEMMING GUITTAR, PERMELIA SIMMONS AND SARAH POWELL.

Brief for Defendants in Error.

W. C. BELCHER,
Attorney for Defendants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 156.

TIERY WRIGHT, PLAINTIFF IN ERROR,

vs.

B. H. ROSEBERRY, FLEMMING GUITTAR, PERMELIA SIMMONS AND SARAH POWELL.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This case comes here on a writ of error to the Supreme Court of the State of California, for review of the judgment of that Court in an action of ejectment commenced on the 9th day of December, 1870, by the plaintiff in error, in the District Court of the Sixth Judicial District of that State, in and for the County of Yolo, against the defendants, to recover from them the possession of certain lands situate in that county, and damages for the withholding of possession.

The plaintiff, in his complaint, alleged that on the 23d day of July, 1866, he "was seized in fee, and possessed of and entitled to the possession of" the land sued for, and that at the time of commencing his action he was the owner in fee of the land and entitled to its possession; that the defendants had entered and ousted him from the possession about the first of January, 1870, and still withheld it; and prayed judgment for the restitution of the land, one thousand dollars damages for the ouster and withholding, and five hundred and sixty dollars per annum for rents and profits.

The lands were in his complaint described as "the north half of the southeast quarter, and the southeast quarter of the southeast quarter of section twenty-four (24); the east half of the northeast quarter and the southwest quarter of the northeast quarter of section twenty-five (25); the southeast quarter of section twenty-five (25); and the northeast quarter of section thirty-six (36); all in Township eleven (11) north, Range two (2) east, Mount Diablo base and meridian."

The defendants Roseberry and Guittar joined in an answer, and after denying generally the allegations of the complaint, allege that the defendant Roseberry, then and at the time of the commencement of the action, was the owner in fee of the southeast quarter of section twenty-five (25) and the northeast quarter of section thirty-six (36), and that the defendant Guittar was in the possession of both quarter sections as a tenant of Roseberry, but claimed neither title nor interest in the land other than as such tenant.

The defendant Simmons filed a seperate answer, denying generally the allegations of the complaint, and alleging that, at the time of the commencement of the action and then, she was the owner in fee and in the possession of the east half of the northeast quarter, and the southwest quarter of the northeast quarter of section twenty-five (25).

The defendant Powell also filed a separate answer, in which she also, after denying all the allegations of the complaint, alleged that at the time of the commencement of the action and then she was the owner in fee and in the possession of the north half of the southeast quarter and the southeast quarter of the southeast quarter of section twenty-four (24).

Each of the defendants also pleaded continuous, open, notorious, and adverse possession of the land by them severally claimed, as against the defendant and all the world, for more than five years next before the commencement of the action, and that the action was barred under the provisions of the Statute of Limitations.

The case was twice tried. At the first trial the Court gave judgment for plaintiff against the defendant Roseberry for the south half of the northeast quarter of section thirty-six; against the defendant Simmons, for the east half of the northeast quarter of section 25; and against the defendant Powell for the northwest quarter of the southeast quarter of section 24.

The plaintiff and the defendants severally appealed from that judgment to the Supreme Court of the State, (and that Court sus-

tained the several appeals, and reversing the judgment remanded the case to the District Court with directions to find from the evidence already taken) and such further evidence as the parties might adduce, upon certain issues specified in the opinion, and render judgment upon the whole case, (Transcript, page 9.)

At the second trial, had in 1879, the Court made and filed these findings:

[Title of Court and Cause.]

All findings of fact heretofore made in this case are vacated and set aside, and the facts of the case are now found to be as follows:

I. The plaintiff is not now and never was the owner nor entitled to the possession of all or any part of the lands described in his complaint herein, and all and singular the allegations of said complaint are untrue.

II. Neither the said defendants, nor any or either of them, ever at any time unlawfully or without right entered upon the aforesaid land or any part thereof, and none of them have ever ousted the plaintiff from the whole or any part thereof; and none of said defendants have ever wrongfully withheld the whole or any part of said lands from plaintiff; and none of them have injured him in any sum whatever.

III. The rents and profits of the said lands in suit are of the value of $560 per year. The plaintiff has not been damaged by any act of the defendants or either of them in any sum whatever.

IV. All and singular the allegations of the amended answers of the defendants Roseberry and Guittar, of the defendant Simmons, and of the defendant Powell, are true as stated therein respectively.

And I conclude the law to be that the defendants are entitled to judgment, denying the prayer of plaintiff's complaint and dismissing his action, with costs in favor of defendants. Let judgment be so entered. (Transcript, p. 10.)

The judgment was accordingly entered that the plaintiff Tiery Wright take nothing by his suit, and that the said defendants B. H. Roseberry, Sarah A. Powell and Permelia Simmons have and recover of and from said plaintiff, Tiery Wright, their costs of suit, taxed at $782.75. (Transcript, pp. 41, 42.)

The plaintiff moved for a new trial, which was denied.

From this judgment and order the plaintiff appealed to the Supreme Court of the State, by which the judgment and order were in March, 1883, affirmed.

The plaintiff filed a petition for rehearing, which was denied; and he thereupon sued out his writ of error, which was allowed by Judge McKee, the acting Chief Justice.

The evidence on the part of the plaintiff shows that:

1. In the year 1862, Amos Mathews, then County Surveyor of the County of Yolo, surveyed the lands involved in this action, with

other lands situated in that county, and made a map or plat of his survey, on which he represented these lands as swamp and overflowed.

That he, without indorsing or affixing any certificate thereto, some time in the winter of 1862, or spring of 1863, left said map or plat in the office of the State Surveyor General, where it remained without any authentication or mark of filing or approval, until 1872, when he indorsed thereon his affidavit, stating, in substance, that the law of 1861 had been complied with by him in the matter of making and returning said survey and plat. (Transcript, p. 15)

"This map," said the witness Twitchell, "has remained among the archives of that office ever since. No other segregation map of *these* lands was ever in the office. There was another map, called the original segregation map, made by Wm. Minis, a former County Surveyor, which did not embrace these lands, for the reason that they were then supposed to be included in a platted Mexican grant, and were not, therefore, segregated." (Transcript, p. 14.)

2. On the first day of July, 1862, the State of California issued two certificates of purchase—the one No. 1659, for Swamp Land Survey No. 588, to J. W. Tuttle, for the southeast quarter of Section 24 and the east half of Section 25, Township 11 north, Range 2 east, Mount Diablo meridian, which certificate was, on the 14th of January, 1864, assigned to plainttff; and the other, No. 1660, for Swamp Land Survey No. 592, to W. H. Alvis, for the east half of Section 36, in the same township; which certiffcate was on the 10th of July, 1862, assigned to the plaintiff. Both these certificates describe the lands as "swamp and overflowed lands granted by the United States to the State of California, by the Act of Congress of September 28th, 1850." (Transcript, pp. 10 and 11.)

3. In 1864, Township 11 north, Range 2 east, Mount Diablo meridian, was surveyed and subdivided in the field under authority of the United States, by Deputy United States Surveyor Thompson, and the plat of such survey was on the 10th of Janaary, 1866, approved by the United States Surveyor General for California.

On this plat the east half of the northeast quarter of Section 25 was designated as swamp and overflowed land, but no other of the lands involved in this action were so designated (Transcript, p. 11), and all of them were thereon designated as high and arable land. (Transcript, p. 5.)

4. Between the 22d day of March and the 4th day of April, 1872, the State Surveyor General sent to the United States Surveyor General for California, a certified copy of the map left in his office by Mathews with the affidavit of Mathews indorsed, and the Surveyor General of the United States thereupon caused to be constructed an amended plat of Township 11 north, Range 2 east, Mount Diablo meridian, which was indorsed as approved by him on the 4th day of April, 1872, and on which all the lands involved in this action were represented as swamp and overflowed lands. (Transcript, pp. 5, 6.)

5. At the time of the commencement of the action and at the time of its trial the defendant Roseberry was in the possession of the southeast quarter of Section 25 and the northeast quarter of Section 36; the defendant Simmons with her family was in the possession of the east half of the northeast quarter of Section 25; and the defendant Powell was in possession of the east half and the northwest quarter of the southeast quarter of Section 24. The plaintiff Wright had never been in possession of any portion of the land. (Transcript, p. 31.)

The evidence on the part of the defendants shows these facts:

1. As to the S.E. ¼ of Sec. 25.

For some time prior to 1862, this quarter section was settled upon and occupied by a Mrs. Prosser, who had a house on the northerly part of the quarter section in which she lived, and had fifteen or twenty acres inclosed and usually in cultivation. She died in 1862, and her administrator, under orders of the Probate Court, sold and conveyed the quarter section by deed to the defendant Roseberry in February, 1864. Immediately upon his purchase, Roseberry entered into possession, and built and thereafter maintained a substantial fence around the quarter section, and had every year cultivated a considerable portion of the land, and had maintained the exclusive and adverse possession of the whole from the time of his entry in 1864 up to the time of the trial.

In 1864 Roseberry filed in the proper local land office his declaratory statement for the purchase of the quarter section as a pre-emption claim or right, and on the 15th of June, 1866, the United States issued to him a patent for it. (Transcript, p. 30.)

2. As to the N.E. ¼ of Sec. 36.

On the 2d of September, 1864, one George Bolin filed in the proper local land office his declaratory statement for the purchase of this quarter section as a pre-emption claim or right, alleging settlement in March of that year.

On the 20th of February, 1868, the United States issued to him a patent for the quarter section. On the 1st of January, 1871, he conveyed the quarter section by deed to defendant Roseberry. (Transcript, pp. 29, 30.)

3. As to the E. ½ of N.E. ¼ of Sec. 25.

In the year 1857 one Silas George Simmons, then the husband of the defendant Permelia Simmons, with his family, settled on the east half of the northeast quarter of Section 25, and inclosed a part of it. On the 23d of August, 1864, he filed in the proper local land office his declaratory statement for the purchase of that half-quarter section, and on the 29th of July, 1871, the United States issued a patent therefor to his heirs. (Transcript, p. 30.)

4. As to the N. ½ and S.E. ¼ of the S.E. ¼ of Sec. 24.

In the fall of the year 1861 Josiah Lippincott, then the husband of the defendant Sarah Powell, inclosed a portion of the north half and the southeast quarter of the southeast quarter of Section 24, with a fraction of land adjoining it on the east, and built a dwelling house on the fraction. Thereafter he, with his wife, the defendant Powell, continued to live in the house and to occupy and use the land up to the time of his death in August, 1865; and the defendant Powell, his widow, continued thereafter, up to the time of the trial, to occupy and use the land, and had built a new house on the adjoining fraction.

On the 8th of August, 1864, Josiah Lippincott filed in the proper local land office his declaratory statement for the purchase of this land as a pre-emption claim or right; and on the 1st of November, 1867, the United States issued to his heirs a patent for the land.

5. Prior to 1869, the State of California, upon the application of the plaintiff Tiery Wright and one W. C. Wright, as claimants under the State, asked for, and the Commissioner of the General Land Office ordered, the United States Surveyor General to examine and take and report testimony in regard to the character of

this and other lands in Township 11 north, Range 2 east, Mount Diablo meridian. The then Surveyor General took and reported testimony, probably in 1868, and forwarded it to the Commissioner of the General Land Office, but the Commissioner, not being satisfied from the testimony then taken, again, in February, 1869, referred the matter to Surveyor General Sherman Day, who, during that year, visited and examined the land personally, and held an investigation at Knight's Landing, only a short distance away from the land, at which all the parties in interest were heard.

The testimony thus taken was forwarded by the Surveyor General, with his report, to the Commissioner, under date of March 9th, 1870. In that report, Surveyor General Day, referring to the segregation made by Thompson, the Deputy Surveyor, who made the survey in the field, in 1864, said.

> With the evidence now before me, and from my own observation, I should not have included in that segregation the east half of the northeast quarter of Section twenty-five.

But his opinion was that if the determination of character was to be based upon "the condition of the land during an average or majority of the seasons during the last eighteen or nineteen years, or, generally, through a fair average of seasons," "the northwest quarter of the southeast quarter of Section twenty-four, and the south half of the northeast quarter of Section thirty-six," should be conceded to the State. (Transcript, pp. 36, 37.)

Upon reviewing the testimony taken, and the report of the Surveyor General, the Commissioner held that as to the lands patented to Roseberry by his patent of June 16th, 1866, to the heirs of Lippincott by their patent of November 1st, 1867, and to Bolin, by his patent of February 20th, 1868, the Land Department could exercise no further discretion or control; and that as the east half of the northeast quarter of Section 25 was covered by the pre-emption claim of Simmons, and such claims were, if made in good faith, protected by the Act of 1866, the determination must be first referred to the Register and Receiver of the local land office, before whom the pre-emptor could appear to establish his right to protection under the Act. (Transcript, p. 38. Letter of Commissioner Williamson to Surveyor General, under date April 12th, 1870.)

Subsequently such proceedings were had in the local land office and in the General Land Office in the matter of Simmons' pre-emption claim, that the claim was allowed and the patent was issued to his heirs on the 29th July, 1871.

6. Under date of July 6th, 1877, the State of California, through its then State Surveyor General, William Minis, forwarded to the Commissioner of the General Land Office certified copies of Swamp Land Surveys Nos. 588 and 592, and certificates of purchase Nos. 1659 and 1660, and specially asked that certain tracts of land, including the north half of the southeast quarter and the southeast quarter of the southeast quarter of Section 24 be listed to the State. The Commissioner, on the 24th of July, 1877, denied the application, and his decision was, on appeal, affirmed by the Secretary of the Interior on the 8th of January, 1879. (Transcript, pp. 33, 34 and 35. Papers marked A, B and C.)

POINTS AND AUTHORITIES.

I.

UNDER THE ACT OF CONGRESS OF SEPTEMBER 28TH, 1850, GRANTING SWAMP AND OVERFLOWED LANDS TO THE STATES, THE SECRETARY OF THE INTERIOR IS THE OFFICER, AND HIS DEPARTMENT THE TRIBUNAL, TO DETERMINE WHAT LANDS ARE WITHIN THE GRANT, AND HIS DECISION IS CONCLUSIVE.

Sec. 2, Act of Sept. 28th, 1850;
French v. *Fyan*, 3 Otto, 169, 171.

In *French* v. *Fyan*, Mr. Justice Miller, delivering the opinion of the Court, says:

We are of opinion that this section (the second section of the Act) devolved upon the Secretary, as the head of the Department which administered the affairs of the public lands, the duty, and conferred on him the power of determining what lands were of the description granted by that Act, and made his office the tribunal whose decision on that subject was to be controlling.

We have so often commented in this Court on the conclusive nature and effect of such a decision when made and evidenced by the issuance of a patent, that we can do no better than to repeat what was said in the case of *Johnson* v. *Towsley*, 13 Wall., 72, where the whole question was reviewed both on principle and authority. In that case it had been strongly argued that the specific language of one of the statutes concerning pre-emption on the public lands, made the decision of the Commissioner of the General Land Office conclusive everywhere, and under all circumstances. The Court responded to this argument in this language:

"But while we find no support to the proposition of the counsel for plaintiffs in error in the special provisions of the statute relied on, it is not to be denied that the argument is made stronger when founded on the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal within the scope of its authority, is conclusive upon all others. That the action of the Land Office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title must be admitted under the principle above stated; and in all Courts, and in all forms of judicial proceedings where this title must control, either by the limited powers of the Court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained."

That decision has been many times recognized and affirmed, and by it the rule was settled that when the Land Department has issued a patent for any given tract of land as high land, and particularly where, as here, it has issued a patent after having made special inquiry and examination, through its subordinate officers, to determine the character of the land with reference to the grant, the question of character is conclusively settled in favor of the patentee, and cannot be re-examined in an action at law.

Here we have as evidence of the decision of the Department of the Interior as to the character of these lands:

First. Patents of the United States to defendants as pre-emptors.

Second. Report of the United States Surveyor General of his investigation made upon the application of the plaintiff and the decision of the Commissioner upon that report.

Third. Decision of the Commissioner and Secretary of the Interior refusing to list the land to the State upon its application made by the State Surveyor General.

II.

IN AN ACTION OF EJECTMENT, PATENTS OF THE UNITED STATES FOR THE LANDS INVOLVED ARE CONCLUSIVE EVIDENCE OF THE LEGAL TITLE.

French v. *Fyan*, 3 Otto, 169;
Johnson v. *Towsley*, 13 Wall., 72;
Leese v. *Clark*, 18 Cal., 572;
Miller v. *Dale*, 44 Cal., 562;
Churchill v. *Anderson*, 56 Cal., 55;
Gibson v. *Chouteau*, 13 Wall., 102;
Bagnall v. *Broderick*, 13 Pet., 436;
Patterson v. *Tatum*, 3 Sawy., 172;
Morse v. *Robbins*, 6 Otto, 530;
Cahn v. *Barnes*, 7 Sawy., 48.

In *French* v. *Fyan* the Court say:

We are of opinion that, in this action at law, it would be a departure from sound principle and contrary to well considered judgments in this Court and others of high authority to permit the validity of the patent to the State to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the Court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey.

That case showed that the United States had issued a patent to the State, upon its request, for the land as swamp and overflowed land under the Act of September 28th, 1850; that Congress had in 1852 made a grant of land to the Missouri Pacific Railroad Company, and the land involved had been surveyed and returned as high land, and had been certified by the Commissioner to the railroad company as part of the land granted to it. The plaintiff claimed under the certificate and grant to the railroad company, the defendants under the State, and the party resisting the patent offered to prove by witnesses that the land was not in fact swamp and overflowed land within the meaning of the Act, while in our case the plaintiff sought to prove that the land was swamp and overflowed land within the meaning of the Act by witnesses, by the State segregation map, and the new plat constructed by the United States Surveyor General under the fourth section of the Act of July 23d, 1866.

In *Leese* v. *Clark*, 18 Cal., 572, Mr. Justice Field, then Chief Justice of the Supreme Court of California, speaking of the conclusive character of a patent, says:

> Upon all the matters of fact and law essential to authorize its issuance, it purports absolute verity; *and it can only be vacated and set aside by direct proceedings instituted by the Government, or by parties acting in the name and by the authority of the Government.* Until thus vacated it is conclusive, not only as between the patentee and the Government, but between parties claiming in privity with either by title subsequent.

And in *Gibson* v. *Chouteau*, 13 Wall., 102, the same learned Judge says:

> But in the action of ejectment in the Federal Courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title. So, also, in the action of ejectment in the State Courts, when the question presented is whether the plaintiff or defendant has the superior legal title from the United States, the patent must prevail.

Miller v. *Dale*, 44 Cal., 562, was ejectment for land in Santa Clara County. The land was embraced within the calls of two Mexican grants—*Las Animas* and *El Solis*—both of which had been finally confirmed by the proper tribunals of the United States. For *El Solis* a patent had been issued. For *Las Animas* the survey had been finally approved by the United States District and Circuit Courts, but no patent had been issued. The plaintiffs, claiming under the *Las Animas*, sought to attack the *El Solis* patent, under which the defendants claimed, on the ground that the confirmation of

the grant had been procured by false testimony, but it was held that the patent could not be collaterally attacked, and that it was, so long as it remained unvacated, conclusive against the Government and against all parties claiming under the Government by title subsequent.

The judgment in that case was reviewed in this Court, and affirmed in *Miller* v. *Dale*, 2 Otto, 473.

In *Gibson* v. *Choteau*, 13 Wall., 102, the Court say:

> The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the Covernment conveyance. If other parties possess equities superior to those of the patent, upon which the patent issued, a Court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. *But, in the action of ejectment in the Federal Courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title. So, also, in the action of ejectment in the State Courts, when the question presented is whether the plaintiff or the defendant has the superior legal title, the patent must prevail.*

In *Churchill* v. *Anderson*, 56 Cal., 55, Judge McKinstry, speaking for the Court, repeats and adopts the language of Judge Field, in *Doll* v. *Meador*, 16 Cal., 325, where he says:

> If a patent be void upon its face, it may be assailed at any time, and in all cases, for it is itself record evidence of the matter which renders it a nullity. If it be issued in the absence of legislation directing a disposition of the property described, or by an officer who is not invested with power to sign the same, or for an estate prohibited, its validity may also be controverted in any action, either directly or collaterally; but if the authority to issue the patent *depend upon the existence of particular facts in reference to the condition or location of the property, or the performance of certain antecedent acts*, and the officers have been appointed for the ascertainment of these matters in advance, who have passed upon them and given their judgment, then the patent, though the judgment of the officers be in fact erroneous, cannot be attacked collaterally by parties showing title subsequently from the same source, much less by those who show no color of title in themselves.

Here the issuing of the patent was, by the Act of Congress, made to depend upon the existence of particular facts in reference to the condition of the land—whether it was high land, suited to cultivation, and open to settlement and purchase under the pre-emption laws. The Department of the Interior had been appointed to ascertain and determine the facts, and had given its decision, and upon that decision the patents had been issued, and they were not open to collateral attack.

The rights of the defendants were based upon settlements made and declaratory statements filed prior to the passage of the Act of July 23d, 1866, and their rights were saved by special provisions of that Act. Roseberry's patent for the southeast quarter of Section twenty-five was issued prior to the passage of that Act.

In *Cahn* v. *Barnes*, decided in 1881, in the United States Circuit Court for the District of Oregon, the plaintiff claimed under a patent from the United States issued under a wagon road grant to the State of Oregon. The defendant claimed under a certificate of purchase from the State, for the land as swamp and overflowed land. The facts in that case were in many respects like the facts in this. There the State had selected the land as swamp and overflowed and issued to the defendant its certificate of purchase, but the land had not been listed or patented to the State as swamp. There too the United States had issued a patent for the land as high land.

At page 52 Judge Deady says:

> The first and material question to be decided in this case is, whether the patent issued to the State under the grant of July 5, 1866, for the premises in controversy, is conclusive evidence in this action that they belong to the wagon road grant and not to the swamp land one.
>
> The swamp land grant was a grant *in presenti* of all the swamp and overflowed lands in the State thereby "made unfit for cultivation," but the determination of what lands come within this category and what do not, rests with the Secretary of the Interior, and his decision is final unless impeached for fraud or mistake.
>
> *French* v. *Fyan*, 93 U. S., 170.
>
> * * *
>
> The wagon road grant, was a grant, *in presenti* also, of the odd sections for six miles on either side of the road wherever it might be located, between the *termini* named, which, so soon as the line of the road was designated, attached to such sections within the prescribed limits on either side of said line, and took effect from the date thereof.
>
> But the grant to the wagon road being subsequent in point of time to that of the swamp land, the former could not attach to any legal subdivision within the operation of the latter, unless they had reverted to the United States for want of selection in due time, which could not have occurred in this case, as the surveys were not extended over the premises till 1869. * * *
>
> In the face of *French* v. *Fyan*, and even upon general principles, counsel for the defendant does not deny but that if the patent had issued to the State for the premises under the Swamp Land Act, it would be conclusive in this action as to the character of the land; but it is nevertheless contended that the patent, actually issued to the State under the wagon road grant, is not such evidence that the lands are not swamp, because in the consideration and determination in the Land Department of the question whether the premises were within the wagon

121-522

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 231.

ALFRED ROBINSON, PLAINTIFF IN ERROR,

vs.

JOHN ANDERSON, WILLIAM ANDERSON, JESSE ADKINSON, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED FEBRUARY 15, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 231.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Return of Marshal to Summons.*

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the annexed writ on the 19th day of July, 1882, and personally served the same on the 24th day of July, 1882, by delivering to and leaving with John Anderson, Wm. Anderson, John Barrett, N. W. Best, H. W. Head, Charles McManus, whose true name is Chas. G. McManus; N. A. Palmer, W. M. Whitehead, Spencer Franklin; on the 25th day of July, 1882, by delivering to and leaving with A. T. Brown, Chas. Best, J. Bushard, whose true name is J. V. Bushard; F. G. Beauchamp, G. W. Cox, Jno. Doe Clinton, whose true name is Henry Clinton; Mrs. Mary English, John Farrar, whose true name is Jno. N. Farrar; J. Greenia, John Garner, M. A. Grooms, Charles Johnson, Gus Jones, whose true name is W. A. Jones; J. McDowell, whose true name is Jno. C. McDowell; Chas. McDowell, L. Noel, Henry Owens, G. Powers, whose true name is John W. Powers; J. Taylor, Thos. J. Williams, Silas Wright, P. Weiner, whose true name is P. L. Weiner; Absalom Doe, whose true name is Ira Weiner; Arthur Doe, whose true name is R. R. McDowell; Bolivar Doe, whose true name is Thos. Hambright; Chas. Doe, whose true name is Jesse Peckwood; Clarence Doe, whose true name is Peter J. Farrar; Daniel Doe, whose true name is James B. Raim, on the 26th day of July, 1882, by delivering to and leaving with J. Brenot, J. Chapman, whose true name is J. N. Chapman; Jno. Doe Garner, whose true name is John Garner, Jr.; R. McGarvin, whose true name is Dennis McGarvin; H. Randolph, whose true name is H. Randolph; Thompson Sears, whose true name is Thomas Sears; H. Solters, P. Ulrich, J. G. Walker, D. W. Wells, Abram Doe, whose true name is Oscar C. Blodgett; Asa Doe, whose true name is Chester C. Gilbert; Beriah Doe, whose true name is Wm. Ward; Clement Doe, whose true name is Jno. D. Hanna; Gustav Schwartz; on the 27th day of July, 1882, by delivering to and leaving with Jesse Adkinson, Mary Mefford, Daniel Doe, whose true name is Aaron Vanderkarr; on the 28th day of July, 1882, by delivering to and leaving with John Dameron, E. Howe, Jno. Huntley, G. W. Holliday, J. Neice, whose true name is Wm. J. Neice; C. R. Parris, whose true name is C. R. Parrish; on the 29th day of July, 1882, by delivering to and leaving with B. F. Stahl; on the 31st day of July, 1882, by delivering to and leaving with Peter Brush, whose true name is David Brush; Mrs. Hannah H. Hawbright, M. Paine, Anna Doe, whose true name is Elizabeth A. Paine; Edward Doe, whose true name is Jno. Paine; on the 1st day of August, 1882, by delivering to and leaving with G. R. Parrish, whose true name is M. T. Pain; on the 2d day of August, 1882, by delivering to and leaving with Mrs. Jane Doe Sole, whose true name is Celia Sole; J. Mock, Jno. Doe Welsh, whose true name is Lawrence Welsh; Edgar Doe, whose true name is Edgar Sole; Frank Doe, whose true name is Abraham M. McWilliams; on the 3d day of August, 1882, by delivering to and leaving with J. A. Woodhouse, George Doe, whose true name is

2

3

Hiram C. Churchill; on the 4th day of August, 1882, by delivering to and leaving with H. W. Clark; on the 22d of August, 1882, by delivering to and leaving with J. M. Edington, said defendants named therein, personally, at the county of Los Angeles, in said district, a certified copy thereof, together with a copy of the
4 bill of complaint, certified to by E. W. McGraw, att'y for pl'ff, attached thereto, and I further certify that I personally served the same on the 12th day of August, 1882, by delivering to and leaving with J. W. Jones and J. C. Palmer; on the 14th day of August, 1882, by delivering to and leaving with S. L. Chilson, said defendants named therein, personally, at the county of Tulare, in said district, a certified copy thereof, together with a copy of the bill of complaint certified to by E. W. McGraw, att'y for pl'ffs, attached thereto.

M. M. DREW, *U. S. Marshal*,
By J. D. DUNLAP, *Deputy*.

5 *Summons.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, of the Ninth Circuit, in and for the District of California.

ALFRED ROBINSON, Plaintiff,
vs.
JESSE ADKINSON *et al.*, Defendants.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city of San Francisco.

The President of the United States of America to Jesse Adkinson, John Anderson, Wm. Anderson, A. F. Brown, John Barrett, Peter Brush, N. W. Best, Charles Best, J. Brenot, J. Bushard, F. G. Beauchamp, J. Bennett, H. W. Clark, G. W. Cox, J. Chapman, S. L. Chilson, John Doe Clinton, John Dameron, J. M. Edington, Mrs. Mary English, John Farrar, Spencer Franklin, J. Greenia, John Garner, John Doe Garner, M. A. Grooms, E. Howe, John Huntley, G. M. Holliday, H. W. Head, Mrs. Hannah H. Hambright, Charles Johnson, Gus Jones, J. W. Jones, R. McGarvin, J. Mc-
6 Dowell, Charles McDowell, Charles McManus, Mary Mefford, J. Mock, L. Noel, J. Neice, Henry Owens, N. A. Palmer, C. R. Parris, G. R. Parrish, M. Paine, G. Powers, H. Rudolph, B. F. Stohl, Mrs. Jane Doe Sole, Thompson Sears, H. Salter, J. Taylor, P. Ulrick, Thos. J. Williams, J. G. Walker, Silas Wright, J. A. Woodhouse, W. M. Whitehead, John Doe Welsh, P. Weimer, D. W. Wells, Abram Doe, Absalom Doe, Anna Doe, Angeline Doe, Asa Doe, Arthur Doe, Beriah Doe, Belinda Doe, Bertha Doe, Bolivar Doe, Charles Doe, Clara Doe, Charlotte Doe, Clarence Doe, Clement Doe, Dora Doe, Daniel Doe, David Doe, Edward Doe, Edgar Doe, Emma Doe, Eva Doe, Fred. Doe, Fanny Doe, Frank Doe, George Doe, Gus Doe, Grant Doe, Henry Doe, Hattie Doe,

Isaac Doe, John Doe, Jemima Doe, Kate Doe, Lewis Doe, Matthew Doe, Nat. Doe, Obed Doe, Peter Doe, Patty Doe, Quiet Doe, Red Doe, Robert Doe, Sam. Doe, Susan Doe, Tom. Doe, Uncle Doe, Vain Doe, William Doe, Xerxes Doe, Young Doe, Zebra Doe, James C. Palmer, and Gustave Schmitz, defendants, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the
7 United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons if served in this county, or if served out of this county then within 30 days, or judgment by default will be taken against you.

The action is brought to recover from you possession of certain lands in Los Angeles county, State of California, being a portion of the Rancho Los Bolsas, so called, a description of which lands appears in the complaint herein, a certified copy of which is herewith served upon you; also to recover $30,000 damages for the retention of said premises, and for the use and occupation of the same and costs of suit.

And if you fail to appear and plead, answer, or demur, as herein required, the plaintiff will apply to the court for the relief
8 demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 18th day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the 107th.

[SEAL.] LORENZO S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk*.

Endorsed: Filed February 10th, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

9 *Complaint.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

ALFRED ROBINSON, Plaintiff,

vs.

JESSE ADKINSON, JOHN ANDERSON, WM. ANDERSON, A. F. BROWN, John Barrett, Peter Brush, N. W. Best, Charles Best, J. Brenot, J. Bushard, J. G. Beauchamp, J. Bennett, H. W. Clark, G. W. Cox, J. Chapman, S. L. Chilson, John Doe Clinton, John Dameron, J. M. Edington, Mrs. Mary English, John Farrar, Spencer Franklin, J. Greenia, John Garner, John Doe Garner, M. A. Grooms, E. Howe, John Huntley, G. M. Holliday, H. W. Head, Mrs. Hanna H. Hambright, Charles Johnson, Gus. Jones, J. W. Jones, R. McGarvin, J. McDowell, Charles McDowell, Charles Mc-

15 They claim, also, that they are "third persons," as to whom the patents of Los Bolsas are not conclusive, under the act of Congress of the United States first hereinafter referred to.

That plaintiff contest- and deny each and every of said claims made by the defendants.

In the determination of the question involved, a construction of the act of Congress of the United States entitled "An act to ascertain and settle private land claims in the State of California," passed March 3, 1851, and especially of sections 13 and 15 of said act; a construction of the patents aforesaid to the Rancho Los Bolsas; a construction of the decree of confirmation of the Rancho Santiago de Santa Ana, and a construction of the treaty of Guadalupe Hidalgo, and especially of articles VIII and IX of said treaty, will be and become necessary.

Plaintiff further saith that the Rancho Santiago de Santa Ana was duly surveyed by Henry Hancock, deputy United States surveyor for California, in November and December, 1857; that

16 said survey was duly approved by the United States surveyor general for California, Mandeville, June 13, 1859, and by him in the same year duly advertised according to law, and no objections were made or filed thereto; that afterward, and, in October, 1874, said survey was duly re-advertised by the United States surveyor general for California, Stratton, under the provisions of the act of Congress entitled "An act to expediate the settlement of titles of lands in the State of Califonia," approved July 1st, 1864; that no objections were filed to said survey within the time allowed by said act of Congress, and that, according to said survey by said Hancock, the westerly line of said Rancho Santiago de Santa Ana and the easterly line of the said Rancho Los Bolsas, as described in the patents aforesaid, are the same and identical.

That on March 4th, 1878, John Huntley, J. M. Edington, W. H. Morrow, and José Antonio Yorba filed in the office of the surveyor general of California a protest and objection to said Hancock survey, claiming it to be incorrect in various particulars.

17 That on January 4, 1879, United States Surveyor General Wagner transmitted to the Commissioner of the General Land Office the plat and field notes of said Hoffman survey, together with the said protest thereto, together with a letter expressing his own opinion that the survey was incorrect.

On May 25th, 1882, the Commissioner of the General Land Office refused to approve of said survey and ordered a new survey in accordance with certain instructions given by him.

That the Hancock survey excluded the lands in controversy from the Santa Ana grant; that the new survey ordered by the Commissioner would, if made according to his instructions, include a large portion, and, perhaps, the whole of said lands within that grant as plaintiff is informed and believes, and would cause the two grants to overlap.

That immediately on the announcement of said decision of the land commissioners defendants entered upon said lands and

18 ousted E. P. Whitmore, the then tenant of plaintiff, from the

possession thereof, claiming a right to make such entry and a justification thereof under the said decision of the Commissioner of the General Land Office and as claimants of undivided interests of the Rancho Saniago de Santa Ana as aforesaid.

Plaintiff further saith that the Commissioner of the General Land Office derives all his power and authority from the laws of the United States.

Plaintiff claims that the said Commissioner had no power or jurisdiction under the laws of the United States hereinbefore referred to or under any other law of the United States to refuse to approve the said Hancock survey or to order a new survey of said Rancho Santiago de Santa Ana; that by virtue of the proceedings hereinbefore recited the said Hancock survey of the Rancho Santiago de Santa Ana became a finality, which claim defendants deny. A determination of said questions involved in the case will necessarily call for a construction of said act of Congress entitled "An act to ex-
19 pediate the settlement of titles to lands in the State of California," and particularly of section one of said act, and also of the acts and laws of the United States creating and prescribing the duties of the office of Commissioner of the General Land Office, and also of the acts, decrees, patents, and treaty hereinbefore referred to.

VI.

Plaintiff further saith that the lands and premises of which the defendants are so as aforesaid wrongfully in possession, and the possession of which plaintiff seeks to recover in this action, are bounded and described as follows, to wit, and are a portion of the Rancho Los Bolsas, in Los Angeles county, California:

Beginning at a post in an irregular mound with charred stake in the dry bed of the channel of the river Santa Ana, being station No. 79 of the Rancho Santiago de Santa Ana; thence, the variation of the magnetic needle being fourteen degrees east, along the southerly boundary of the said rancho north fifty-four degrees and forty-five minutes west; at five chains enters bed of Santa Ana river,
20 running west of south; at fifty-seven chains and fifty links across same; at eighty chains and forty links enters old bed of Santa Ana river, course southwest; at eighty-three chains and fifty links, post marked "S. J. C., No. 5," and "L. B." on bank of old Santa Ana river; at ninety-eight chains leaves dense weeds; at one hundred and one chains crosses main road, course north; at one hundred and forty chains enters dry bed of arroyo, bears southwest and enters weeds; at one hundred and forty-two chains leaves bed of arroyo, bears southwest; at one hundred and fifty-six chains post marked "S. J. C., No. 4," a corner of the Rancho San Juan Cajon de Santa Ana station; thence north forty-six degrees and thirty minutes west; at eighteen chains a mound on line; at thirty-three chains and fifty links crosses road, course northeast and southwest; at forty-three chains leaves dense weeds; at sixty-nine chains and sixty links Mr. Hanna's house bears south seventy-one de-

grees and fifty minutes west; at seventy-six chains road
21 runs northeast to Anaheim; at seventy-eight chains road runs northeast to Anaheim; at eighty-seven chains Mr. Hanna's house bears south sixteen degrees and thirty minutes east; at ninety-one chains and fifty links an elder about fifty links to the right; at ninety-eight chains mound on line, and one hundred and seventy-eight chains to a red wood post marked "S. J. C., No. 3," and "L. C. L. B.," being the S. W. corner of the Rancho San Juan Cajou de Santa Ana station; thence along the easterly boundary of the Rancho Los Coyotes south one degree and thirty minutes west; at thirty-five chains crosses road, course southwest and northeast; at eighty chains mound on line; at eighty-four chains and fifty links crosses road nearly west to a house about twenty-five chains distant; at one hundred and thirty chains crosses road southwest and northeast; at one hundred and forty-seven chains and fifty links crosses road, course northeast and southwest; at one hundred and sixty chains mound on line, and one hundred and seventy-seven
22 chains and eighty links to post "L. C.," S. E. cor., and "L. B.," being S. E. corner of Rancho Los Cayotes station; thence along south boundary of Rancho Los Coyotes north seventy degrees and seventy minutes west; at twenty-one chains and twenty-five links crosses road northeast and southwest, and at sixty-four chains and eighty links post marked "L. A.," N. E. corner "L. B." and "L. C.," being N. E. corner of the Rancho Los Alamitos and corner of Rancho Los Bolsas station; thence leaving the boundary of Los Coyotes and along easterly boundary of Rancho Los Alamitos south six degrees and thirty-seven minutes west; at twenty-three links crosses road, course northwest, and seventy-five chains and twenty-three links to post "143 L. C." station; thence, the variation of the magnetic needle being thirteen degrees and thirty minutes east, south eighty-nine degrees and twenty minutes west; at seventy-seven chains and fifteen links intersected the western boundary of township four, south of the base line of range ten west of the San Bernardino meridian, ten links north of the southwest corner of same, and two hundred and twenty-nine chains
23 and fifteen links to a point in a sand patch called the "Corral de los Tunas," or station No. 142 of the Rancho Los Coyotes, and station 36 of the Rancho los Alamitos; thence along boundary of said rancho south forty-nine degrees and thirty mines west, one hundred and seventy-six chains, to station No. 6, at a point on line of the eastern boundary of the rancho called "Los Alamitos," post and charred stake in an irregular mound; thence along the boundary of the Rancho La Bolsa Chica, the variation of the magnetic needle being 13 degrees 15 minutes E., south seventy-two degrees east, two hundred and forty chains to station No. 7, and a place on the north of a small swamp or "cienega" called the "Corral de San Gabriel," being the northeast corner of the rancho called "La Bolsa Chica," a post and charred stake in an irregular mound of earth about five chains north of swamp; thence on the line between this rancho and the east boundary of the Rancho Bolsa Chico south nineteen degrees and thirty minutes west;

24 at one hundred and five chains and sixty-three links crosses a stream of water eight links wide, course south; at one hundred and twenty-seven chains and sixty-three links crosses another stream of water six links wide and one hundred and seventy-one chains and sixty-three links, base of high land on the southeast called "La Bolsa," at a stake from which an adobe house, occupied by the widow of Murillo, bears north forty-one degrees and thirty minutes east, distant ten chains and sixty links, station; thence along the base of said high land on the east and tule land on the west, as follows: South twenty-one degrees east, nineteen chains to station; thence south thirteen degrees and fifteen minutes west, nine chains to station; thence south fifty-five degrees and forty-five minutes east, two chains to station; thence south five degrees east, five chains to station; thence south eighty-four degrees and thirty minutes west, nine chains to station; thence south thirty-seven degrees and forty-five minutes west, eight chains to station; thence south eighty-seven degrees west, six chains to station; thence south forty-seven
25 degrees and fifteen minutes west, at two chains crosses ravine seventy links wide, course north twenty-two degrees west and six chains to station; thence north twenty-nine degrees and thirty minutes west, five chains to station; thence north eighty degrees and thirty minutes west, eight chains to station; thence north sixty-two degrees and thirty minutes west, three chains to station; thence north eighty-nine degrees and thirty minutes west, three chains to station; thence south fifty-five degrees and thirty minutes west, two chains to station; thence south seventeen degrees and fifteen minutes west, seven chains to station; thence south twenty-six degrees west, eight chains to station; thence south forty-three degrees and fifteen minutes west, seven chains to station; thence south forty-three degrees and forty-five minutes west seven chains to station; thence south thirty-four degrees and forty-five minutes east, two chains to station; thence south seventy-two degrees east, five chains to station; thence south nineteen degrees and forty-five minutes west, at two chains crosses ravine two hundred and fifty links, course
26 west, five chains to station; thence north sixty-four degrees and forty-five minutes west, eight chains to station; thence north eighty-one degrees west, six chains to station; thence south forty-six degrees and forty-five west, three chains to station; thence south thirty-eight degrees and forty-five minutes west, seven chains to station; thence south thirty-two degrees and forty-five minutes west, three chains to station; thence south twenty-eight degrees and forty-five minutes west, ten chains to station; thence south twenty-four degrees and thirty minutes west, six chains to station; thence south thirteen degrees west, four chains to station; thence south thirteen degrees and thirty minutes west, three chains to station; thence south four degrees west, five chains to station; thence south twenty-two degrees and thirty minutes west, six chains to station; thence south forty-five minutes west, twelve chains to a point from which a spring of fresh water bears north fifty-three degrees west, distant two hundred and fifty links; thence south fifty-seven de-
27 grees and fifteen minutes west, fourteen chains to station; thence

south forty-nine degrees and thirty minutes west, seven chains to station; thence south seventy-three degrees and thirty minutes west, six chains to station; thence south forty-seven degrees west, eight chains to station; thence south sixty-one degrees and fifteen minutes west, ten chains to station; thence north seventy-three degrees and fifteen minutes west, four chains to station; thence north seventy-eight degrees and thirty minutes west, twelve chains to station; thence north forty-four degrees and fifteen minutes west, three chains to station; thence north sixty-four degrees west, four chains to station; thence south forty degrees and thirty minutes west, four chains to station; thence south forty-nine degrees and thirty minutes west, at seven chains sand hills of sea beach, seventeen chains the southeast corner of the Rancho Bolsa Chica, a post at high water, marked the S. W. corner of this rancho station; thence along the seashore at high-water mark of the Pacific Ocean,
28 south forty degrees and thirty minutes east, thirty-two chains to station; thence south forty-two degrees and fifteen minutes east, twenty-eight chains to station; thence south forty-seven degrees and forty-five minutes east, thirty-five chains to station; thence south fifty-four degrees east, seventeen chains to station; thence south fifty degrees and forty-five minutes east, forty-five chains to station; thence south forty-eight degrees and thirty minutes east, forty-nine chains to station; thence south fifty-one degrees east, sixteen chains to station; thence south fifty-one degrees and thirty minutes east, seventeen chains to station; thence south fifty-three degrees and fifteen minutes east; at seven chains the high land on the left turns abruptly to the north, forming the west bank of the bottom land of the river "Santa Ana;" at twenty chains, a point from which, over sand hills, twelve chains north, is the southwest corner of a lake of bitter water, about half a mile long, to the eastward, connecting with the river "Santa Ana," and also the inlet of the Rancho Santiago de Santa Ana, and sixty-seven chains
29 to station; thence south fifty-four degrees and thirty minutes east, twenty-two chains to station; thence south fifty-six degrees and thirty minutes east, six chains to station; thence south sixty-seven degrees and fifteen minutes east, thirty chains to station; thence south fifty-seven degrees and thirty minutes east, thirty-three chains to station; thence south fifty-five degrees and thirty minutes east, seven chains to a point at high-water mark, and opposite the mouth of the river "Santa Ana," a post, the southeast corner of Los Bolsas station; thence, the variation of the magnetic needle being fifteen degrees and thirty minutes east, north fifteen degrees and thirty minutes east, at ten chains crosses sand banks to south shore of a narrow inlet or bank of the river "Santa Ana," and thirteen chains across water to station 149 of the previously surveyed Rancho Santiago de Santa Ana, on left bank of the river, in salt marsh; thence up the left bank of the same, it being about one chain wide, north twenty-one degrees east, three chains to sta-
30 tion; thence north four degrees and thirty minutes east, seven chains to station; thence north forty-two degrees and thirty minutes east, six chains to station; thence north thirty-four degrees

and fifteen minutes east, seven chains to station; thence north nineteen degrees and thirty minutes east, eight chains to station; thence north six degrees and thirty minutes west, at two chains crosses slough thirty links wide from east, and sixteen chains to station; thence north thirty-four degrees east, seven chains to station; thence north one degree and thirty minutes east, seven chains to station; thence north eighty-two degrees and thirty minutes east, nine chains to station; thence leaving salt marsh north twelve degrees and forty-five minutes west, ten chains to station, at head of tide-water; thence north thirty-six degrees and forty-five minutes west, seven chains to station; thence north twelve degrees west, six chains to station; thence north fifty-eight degrees and thirty minutes east, three chains to station; thence north thirty-
five degrees and fifteen minutes east, three chains to station;
31 thence north twenty degrees and forty-five minutes west, six chains to station; thence north thirty-four degrees and fifteen minutes east, five chans to station; thence north forty-six degrees and thirty minutes east, nine chains to station; thence north twenty-five degrees and thirty minutes east, six chains to station; thence north thirty-two degrees east, fourteen chains to station; thence north fifty-one degrees east, fourteen chains to a stake, being station No. 129 of Rancho Santiago de Santa Ana, being one chain east of stream, station; thence north six degrees east, at five chains crosses stream fifteen links wide, one of the branches of the river Santa Ana, eleven chains to a stake from which a willow eight inches in diameter bears south nineteen degrees and thirty minutes west, distant one hundred and fifty-seven links, station; thence north eight degrees and thirty minutes west, thirteen chains to stake, being station No. 127 of the previously surveyed Rancho Santiago de Santa Ana, station; thence north seven degrees east, eighty-three chains
32 over a level and moist bottom to point of tule patch about one chain square to a stake on S. E. side of same, being station 126 of the Rancho Santiago de Santa Ana, station; thence north eleven degrees and fifteen minutes east, twelve chains and seventy links to a stake, station 125 of Ranch Santiago de Santa Ana, station; thence north twenty-two degrees and forty-five minutes east, at thirty-seven chains, a point opposite a stream of water on the west some fifteen links wide, course southwest and some three chains distant, fifty-one chains to stake, station 124 of Rancho Santiago de Santa Ana, station, from which a willow tree six inches in diameter bears south twenty-five degrees and thirty minutes west, distant five chains, station; thence north twenty-five degrees and thirty minutes east, at five chains and twenty-three links a stake at intersection of south boundary of section thirty-two, township five south, range ten west, seven chains and seventy-four links west of corner of sections
thirty-two, thirty-three, four, and five, thirty-five chains to sta-
33 tion; thence north forty-three degrees and fifteen minutes east, at three chains and fifty links crosses slough fifteen links wide, course west, nine chains to station; thence north sixty-two degrees and thirty minutes east, ten chains to station on right bank of another slough, course S. W., station; thence south seventy degrees

east, two chains to station; thence north seventy-nine degrees and forty-five minutes east, five chains to station, fifty links west of slough, station; thence north fifty-three degrees and thirty minutes east, fourteen chains to station in center of the old bed of river, from which a cluster of willows at a spring bears north twenty degrees west, distant some twenty chains, station; thence north fifty-one degrees and thirty minutes east, eight chains to station in center of old bed of river Santa Ana, here about sixty links wide, course southwest, and on the south side of a thicket of underbrush, station; thence north seventy degrees east, fifteen chains to stake, being station No. 116 of the previously surveyed Rancho Santiago
31 de Santa Ana, and in old bed of river, station; thence south eighty-eight degrees east, five chains to station in old sandy bed of river Santa Ana, here about one chain wide, course southwest; thence north seventy-seven degrees and thirty minutes east, fourteen chains to station in old bed of river; thence north thirty-five degrees and thirty minutes east, seven chains to station in bed of river; thence north seventy-five degrees and forty-five minutes east, nine chains to station in bed of river; thence north eight degrees and forty-five minutes east, twelve chains to a cottonwood tree, stattion 111 of the Rancho Santiago de Santa Ana; thence north eighty-one degrees east, one chain to stake, station 110 of the Rancho Santiago de Santa Ana; thence north thirty-two degrees and forty-five minutes east, at thirty-five links — cottonwood tree seven inches in diameter on line, at thirteen chains enters timber ranging northeast and southwest, twenty chains to station in old bed of river some thirty links wide; thence north twenty-one degrees and forty-five minutes east, ten chains up old bed of river, station; thence north twenty-two degrees and forty-five
35 minutes east, seven chains to station, from which a willow eight inches in diameter bears south sixteen degrees and thirty minutes west, distant twenty links, and at about two chains distant on the west is a stream of water fifteen links wide, course S. W.; thence up old bed of river north twenty-one degrees and fifteen minutes east, eight chains to station; thence north thirty-eight degrees and fifteen minutes east, eight chains to station, from which a willow tree eight inches in diameter bears south sixty-five degrees west, forty-two links distant — station; thence north forty-two degrees and fifteen minutes west, six chains to station, from which a willow seven inches in diameter bears south sixty-nine degrees east, distant twenty-five links — station; thence north seventeen degrees and thirty minutes west, three chains to station, from which a willow tree fourteen inches in diameter bears north eighty-one degrees west, eighty-seven links distant — station; thence north twenty-two degrees and fifteen minutes east, three chains to station, from
36 which a willow six inches in diameter bears north sixty-one degrees east, distant thirty-one links — station; thence north thirty-one degrees and fifteen minutes west, three chains to station on right bank of old river bed; thence north thirty-one degrees east, three chains to station, some two chains east of the source of a stream fifteen links wide, course southwest; thence north twenty-

seven degrees and forty-five minutes west, three chains to station; thence north twenty-one degrees and thirty minutes east, twelve chains to station; thence north twelve degrees and fifteen minutes east, fourteen chains to station; thence north forty-six degrees and thirty minutes east, five chains and sixteen links to cottonwood tree five inches in diameter in the old bed of river, nine chains to station, from which a cottonwood six inches in diameter bears north seventy-eight degrees east, distant eighty-five links; thence north thirty degrees and thirty minutes east, twenty-seven chains to station in old bed of river forty links wide; thence north nine degrees east, two chains to station in old
37 bed of river forty links wide, from which a willow seven inches in diameter bears south seventy-eight degrees and fifteen minutes west, distant nineteen links; thence north twenty-two degrees west, two chains to station; thence north eleven degrees and thirty minutes west, three chains and fifty links to station; thence north fifty degrees and thirty minutes east, three chains and fifty links to station; thence north twenty degrees east, seven chains and fifty links to station; thence north three degrees east, four chains and fifty links to station; thence north twenty degrees and thirty minutes east, three chains to station; thence north thirty-three degrees and fifteen minutes east, two chains and fifty links to station; thence north thirty degrees and thirty minutes west, four chains and fifty links to station; thence north sixty degrees and thirty minutes west, three chains to stake in the old easterly bed of the river Santa Ana, from which a willow eight inches in diameter bears south sixty-three degrees west, distant seven
38 links; thence leaving old bed of river north sixty-six degrees west, three chains and fifty links to station, from which a willow eight inches in diameter bears south sixty-three degrees west, distant seven links; thence north twenty-one degrees west, forty-five chains and fifty links to station; thence north thirteen degrees and fifteen minutes east, six chains and fifty links to station; thence north twenty-three degrees and fifteen minutes east, at thirty-eight chains crosses road from Los Angeles to San Juan, course east, forty-eight chains enters the present sandy bed of river Santa Ana, here about ten chains wide, course southwest, at sixty-eight chains to station in present bed of river; thence up the same north twenty-seven degrees and thirty minutes east, one hundred and twenty-six chains to station; thence north twenty-two degrees and fifteen minutes east, fifty-three chains to the place of beginning; containing thirty-three thousand four hundred and sixty acres and four one-hundredths of an acre ($33,460\frac{4}{100}$) and designated on the plat
39 of public surveys as lot numbered forty, township four south, range ten west; lot numbered thirty-eight, township five south, range ten west; lot numbered forty, township five south, range eleven west; lot numbered forty, township six south, range ten west, and lot numbered thirty-eight, township six south, range eleven west, all of San Bernardino base and meridian, excepting therefrom, however, all that lies within the foregoing boundaries of

the sections, fractions, and portions of sections known and described as follows, according to the public surveys of the United States:

In township 4 south, range 10 west: Section 21, northwest quarter of section 27, east half of east half of section 20, east half of section 28, south half of southwest quarter of section 28, east half of east half of section 29, south half of section 31, section 32, section 33, south half of northwest quarter of section 34, northwest quarter of southwest quarter of section 34, south half of southwest quarter of section 34.

In township 4 south, range 11 west: South half of south half of section 36.

In township 5 south, range 10 west: Northwest quarter of northwest quarter of section 3, north half the southwest quarter of the northwest quarter of section 3, north half of section 4, southwest quarter of section 4, north half of the northwest quarter of the southeast quarter of section 4, east half of the southeast quarter of section 4, the south half of the southeast quarter of the southeast quarter of section 4, section 5, section 6, section 7, north half of section 8, north half of the southwest quarter of section 8, the southeast quarter of the southwest quarter of section 16, southwest quarter of the southwest quarter of section 8, northwest quarter of the northwest quarter of section 17, south half of section 18, northeast quarter of section 18, south half of the northwest quarter of section 18, south half of the north half of the northwest quarter of section 18, southwest quarter of the northwest quarter of section 22.

In township 5 south, range 11 west: Section 1, section 2, south half of the north half of section 3, southwest quarter of section 3, east half of the southeast quarter of section 3, southwest quarter of the southeast quarter of section 3, southeast quarter of the southeast quarter of section 4, section 9, section 10, section 11, north half of section 12, northwest quarter of the southwest quarter of section 12, east half the northeast quarter of the southwest quarter of section 12, east half of the southeast quarter of section 12, northeast quarter of the northwest quarter of section 14, northeast quarter of the southeast quarter of section 24, north half of the southeast quarter of the southeast quarter of section 24, all of the San Bernardino base and meridian.

VII.

That plaintiff is ignorant of the true names of the defendants, John Doe Clinton, John Doe Garner, Jane Doe Sole, John Doe Welsh, Abram Doe, Absalom Doe, Anna Doe, Angeline Doe, Asa Doe, Arthur Doe, Beriah Doe, Belinda Doe, Bertha Doe, Bolivar Doe, Charles Doe, Clara Doe, Charlotte Doe, Clarence Doe, Clement Doe, Dora Doe, Daniel Doe, David Doe, Edward Doe, Edgar Doe, Emma Doe, Eve Doe, Fred. Doe, Fanny Doe, Frank Doe, George Doe, Gus. Doe, Grant Doe, Henry Doe, Hattie Doe, Isaac Doe, John Doe, Jemima Doe, Kate Doe, Louis Doe, Matthew Doe, Nat. Doe, Obed Doe, Peter Doe, Patty Doe, Quiet Doe, Red Doe, Robert Doe, Sam. Doe, Susan Doe, Tom Doe, Uncle Doe, Vain Doe, William Doe, Xerxes Doe, Young Doe, Zebra Doe, and prays that when he

shall discover their real names that he may be allowed to amend his complaint by inserting the same in lieu of the said fictitious names.

VIII.

Wherefore plaintiff prays judgment for the possession of said premises, and for thirty thousand dollars damages for the detention thereof and for costs.

E. W. McGRAW,
Attorney for Plaintiff.

L. D. LATIMER,
Of Counsel.

UNITED STATES OF AMERICA, }
District of California, } ss:

Alfred Robinson, being first duly sworn, says he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same
43 is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

(Signed) A. ROBINSON.

Subscribed and sworn to before me this 18th day of July, A. D. 1882.

JOS. F. O'BEIRNE,
Commissioner of U. S. Circuit Court, California.

Endorsed: Filed July 18th, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

44 *Answer of G. Schmitz.*

Circuit Court of the United States, Ninth Circuit, District of California.

ALFRED ROBINSON, Pl'ff, *vs.* JESSE ADKINSON *et al.*, Def'd'ts.

Now comes defendant, Gustave Schmitz, and for answer to the complaint of plaintiff saith he has not any possession, right of possession, or claim of possession, or claim of right of possession, nor any right, title, or interest, or claim of right, title, or interest, in or to the premises described in the complaint or any part thereof.

Wherefore he prays to be hence dismissed.

GEORGE H. SMITH,
Att'y for Def'd't.

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

Gustave Schmitz, being duly sworn, says that he is one of
45 the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters

which are therein stated on his information or belief, and as to those matters that he believes it to be true.

(Signed) GUSTAV SCHMITZ.

Subscribed and sworn to before me this 5th day of August, 1882.

[SEAL.] C. W. HUMPHREYS,
Notary Public in and for said County.

Endorsed: Filed Aug'st 16th, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

46 *Plea in Abatement.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

ALFRED ROBINSON, Plaintiff,
vs.
JESSE ADKINSON *et al.*, Defendants.

And all the said defendants in the above-entitled action who have been served with summons in this action, as appears by the return of the U. S. marshal, by Brunson & Wells, their attorneys, come and defend the wrong and injury when, &c., and say that the court here ought not to take cognizance of or sustain the action aforesaid, because they say that the cause of action aforesaid, if any accrued to the said plaintiff, accrued to him at the county of Los Angeles, State of California, within the jurisdiction of the superior court of the said county of Los Angeles, State of California, and not within the jurisdiction of this court, and this court has no jurisdiction of the persons of said defendants or of the subject of the action aforesaid; and this they are ready to verify.

47 Wherefore they pray judgment if the court here will take further cognizance of or sustain the action aforesaid, &c.

BRUSON & WELLS,
Attorneys for said Defendants.

STATE OF CALIFORNIA, *County of Los Angeles*, } *ss:*

H. W. Head, one of the above-named defendants, being duly sworn, says that the above plea is true in substance and matter of fact.

(Signed) H. W. HEAD.

Subscribed and sworn to before me this 23 day of September, A. D. 1882.

[SEAL.] C. W. HUMPHRIES,
Notary Public.

We hereby certify that in our opinion the foregoing plea is well founded in point of law.

BRUNSON & WELLS,
Attorneys for said Defendants.

Endorsed: Service of the within plea is hereby admitted this 27th day of September, 1882. E. W. McGraw, attorney for plaintiff. Filed September 27, 1882. L. S. B. Sawyer, clerk.

48 *Replication to Plea in Abatement.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

ALFRED ROBINSON, Pl'ff, *vs.* JESSE ADKINSON *et al.*, Def'ts.

Now comes the said plaintiff and says that the court here ought to take further cognizance of and sustain his action aforesaid against the said defendants, because the said plaintiff says that the cause of action aforesaid did arise within the jurisdiction of this court now here, to wit, in the county of Los Angeles, in the district of California, as he hath above in declaring alleged, and this he prays may be inquired of by the country, and the said defendants do the like.

E. W. McGRAW,
Att'y for Pl'ff.

Endorsed: Service and receipt of a copy of the within admitted Oct. 14, 1882. Bruson & Wells, att'ys for certain def'ts, per W. V. D. Filed October 14, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

49 At a stated term, to wit, the July term, A. D. 1882, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Monday, the 20th day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order.

ALFRED ROBINSON
vs.
J. ADKINSON *et al.* } No. 2850.

This cause coming on to be heard this day upon the plea to the jurisdiction herein, W. Van Dyke, Esq., appearing on behalf of Brunson & Wells, Esqs., for certain defendants, and L. D. Latimer, Esq., for plaintiff, in support of the complaint herein, it is ordered that the plea herein be, and the same hereby is, withdrawn, with permission to the defendants to file a demurrer on the 21st instant.

50 It is further ordered that said demurrer be, and the same hereby is, overruled, with leave to the defendants to answer in twenty days from the 21st instant upon payment of twenty dollars.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said court this 20th day of November, A. D. 1882.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk*.

51 *Demurrer.*

In the Circuit Court of the United States, 9th Circuit, District and State of California.

ALFRED ROBINSON, Plaintiff,
vs.
JESSE ADKINSON *et als.*, Defendants.

Jesse Adkinson, John Anderson, Wm. Anderson, A. F. Brown, John Barrett, David Brush (sued under the name of Peter Brush), N. W. Best, Charles Best, J. Brenot, J. V. Bushard (sued under the name of J. Bushard), F. G. Beauchamp, H. W. Clark, G. W. Cox, J. N. Chapman (sued under the name of J. Chapman), S. L. Chilson, Henry Clinton (sued under the name of John Doe Clinton), John Dameron, J. M. Edington, Mrs. Mary English, J. N. Farrar (sued under the name of John Farrar), Spencer Franklin, J. Greenia, John Garner, John Garner, Jr. (sued under the name of John Doe Garner), M. A. Grooms, E. Howe, John Huntley, G. M. Holliday, H. W. Head, Mrs. Hannah H. Hambright, Charles Johnson, Wm. A. Jones (sued under the name of Gus. Jones), J. W. Jones, Dennis
52 McGarvin (sued under the name of R. McGarvin), Jno. C. McDowell (sued under the name of J. McDowell), Charles McDowell, C. G. McManus (sued under the name of Charles McManus), Mary Mefford, J. Mock, L. Noel, Wm. J. Nice (sued under the name of J. Nice), Henry Owens, N. A. Palmer, C. R. Parrish (sued under the name of C. R. Parris), M. S. Paine (sued under the name of G. R. Parrish), Muriel Paine (sued under the name of M. Paine), Jno. W. Powers (sued under the name of G. Powers), H. Randolph (sued under the name of H. Randolph), B. F. Stohl, Celia Sole (sued under the name of Mrs. Jane Doe Sole), Thos. Sears (sued under the name of Thompson Sears), H. Solter, J. Taylor, P. Ulrich, Thos. J. Williams, J. G. Walker, Silas Wright, J. A. Woodhouse, W. M. Whitehead, Lawrence Welsh (sued under the name of John Doe Welsh), L. Weimer (sued under the name of P. Weimer), D. W. Wells, Oscar C. Blodgett (sued under the name of Abram Doe), Ira Weimer (sued under the name of Absalom Doe), Elizabeth A. Paine (sued under the name of Anna Doe), Chester C. Gilbert (sued under the name of Asa Doe), R. R. McDowell (sued
53 under the name of Arthur Doe), Wm. Ward (sued under the name of Beriah Doe), Thos. Hambright (sued under the name of Bolivar Doe), Jesse Peckwood (sued under the name of Charles Doe), Peter J. Farrar (sued under the name of Clarence Doe), John D. Harmon (sued under the name of Clement Doe), James B. Raine (sued under the name of Daniel Doe), Aaron Vanderkarr (sued under the name of David Doe), John Paine (sued under the name of Edward Doe), W. H. Sole (sued under the name of Edgar Doe), Abraham M. McWilliams (sued under the name of Frank Doe), Hiram C. Churchill (sued under the name of George Doe), James C. Palmer, Gustave Schmitz, defendants herein, by Bruson & Wells, their attorneys, demur to the complaint of the plaintiff herein on the grounds:

1st. That this court has no jurisdiction of the defendants, the said plaintiff and the said defendants, and each and all of them, being residents and citizens of this State, and the controversy, if any, not being between citizens of different States, or between citizens of a State and citizens or subjects of a foreign State.

54 2d. That this court has no jurisdiction of the subject of the action; that the matter in dispute, if any, is an action for the recovery of the possession of real property, commonly called an action of ejectment, and said alleged or supposed matter in dispute does not arise under the Constitution or laws of the United States or treaties made under their authority.

3d. That the plaintiff in said action has not legal capacity to sue, he being a resident and citizen of the same State with the said defendants, to wit, the State of California.

4th. That the said complaint does not state facts sufficient to constitute a cause of action.

5th. That the complaint is ambiguous, unintelligible, and uncertain.

BRUNSON & WELLS,
Att'ys for said Def'ts.

Per V. D.

The certificate of counsel hereby waived and service of the foregoing admitted.

E. W. McGRAW,
Att'y for Pl'ff.

Endorsed: Filed Nov'r 21st, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

55 *Answer of Jesse Adkinson et al.*

In the Circuit Court of the United States, 9th Circuit, District and State of California.

ALFRED ROBINSON, Plaintiff,
vs.
JESSE ADKINSON *et al.*, Defendants.

Now come Jesse Adkinson, A. F. Brown, John Barrett, David Brush (sued under the name of Peter Brush), N. W. Best, Charles Best, J. B. Bushard (sued under the name of J. Bushard), F. G. Beauchamp, G. W. Cox, J. N. Chapman (sued under the name of J. Chapman), S. L. Chilson, John Dameron, J. M. Edington, Mrs. Mary English, J. N. Farrar (sued under the name of John Farrar), Spencer Franklin, J. Greenia, John Garner, John Garner, Jr. (sued under the name of John Doe Garner), E. Howe, John Huntley, G. M. Holliday, H. W. Head, Mrs. Hannah H. Hambright, Charles Johnson, J. W. Jones, Dennis McGarvin (sued under the name of R. McGarvin), J. Mock, Henry Owens, C. R. Parrish (sued under the name of C. R. Parris), M. T. Paine (sued under the name

56 of G. R. Parish), Muriel Paine (sued under the name of M. Paine), John W. Powers (sued under the name of G. Powers),

H. Randolph (sued under the name of H. Randolph), B. F. Stohl, Thomas Sears (sued under the name of Thompson Sears), P. Ulrich, Thomas J. Williams, J. G. Walker, Silas Wright, J. A. Woodhouse, W. M. Whitehead, Lawrence Welch (sued under the name of John Doe Welch), D. W. Wells, Oscar C. Blodgett (sued under the name of Abram Doe), Elizabeth A. Paine (sued under the name of Annie Doe), Clinton C. Gilbert (sued under the name of Asa Doe), William Ward (sued under the name of Beriah Doe), Peter J. Farrar (sued under the name of Clarence Doe), John A. Harmon (sued under the name of Clement Doe), James B. Raine (sued under the name of Daniel Doe), Aaron Vandekarr (sued under the name of Daniel Doe), John Paine (sued under the name of Edward Doe), Abraham M. McWilliams (sued under the name of Frank Doe), Hiram C. Churchill (sued under the name of George Doe), James C.
57 Palmer, Gustave Schmitz, defendants in this action, and answering plaintiff's complaint herein jointly allege:

I.

That the plaintiff herein was, at and before the filing of the complaint herein, and now is, a citizen of the United States of America and a resident of the State of California.

II.

That all of the defendants named in plaintiff's complaint herein were, at and before the filing of the complaint herein, and now are, citizens of the United States of America and residents of the State of California.

III.

They jointly deny that they are wrongfully, or at *at*, in possession of the lands named and set out in the complaint herein, or any part thereof, or that they wrongfully, or at all, withhold the possession thereof from plaintiff.

IV.

They deny that they were, at the date of filing the complaint herein, or at any time thereafter, or are now, in possession or
58 upon any portion of the land described and set out in plaintiff's complaint; deny that at the date of filing the — of the complaint herein they did, or at any time thereafter have, or now do, withhold from plaintiff the possession of any land or tract of land named and described in plaintiff's complaint.

BRUNSON & WELLS,
Per W. V. D.,
Att'ys for Def'ts.

STATE OF CALIFORNIA,)
County of Los Angeles,) *ss:*

J. M. Edington, being first duly sworn, on oath says that he is one of the defendants named in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof,

and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters and things he believes it to be true.

(S'g'd) J. M. EDINGTON.

Subscribed and sworn to before me this 26th day of December, 1882.

[SEAL.] B. W. LEE,
Notary Public.

59 Endorsed: Service of the within answer is hereby admitted this 28th day of December, 1882. E. W. McGraw, attorney for plaintiff. Filed December 28th, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

60 *Answer of John Anderson et al.*

In the Circuit Court of the United States, 9th Circuit, District and State of California.

ALFRED ROBINSON, Plaintiff,

vs.

JESSE ADKINSON *et al.*, Defendants.

Now come John Anderson, William Anderson, J. Brenot, H. W. Clark, Henry Clinton (sued under the name of John Doe Clinton), M. A. Grooms, William A. Jones (sued under the name of Gus. Jones), John C. McDowell (sued under the name of J. McDowell), Charles McDowell, C. G. McManus (sued under the name of Charles McManus), Mary Mifford, L. Noel, William J. Neice (sued under the name of J. Neice), N. A. Palmer, Celia Sole (sued under the name of Mrs. Jane Doe Sole), H. Salter, J. Taylor, L. Weimer (sued under the name of P. Weimer), Ira Weimer (sued under the name of Abraham Doe), R. R. McDowell (sued under the name of Arthur Doe), Thomas Hambright (sued under the name of Bolivar Doe), Jesse Peckwood (sued under the name of Charles Doe), W. H.
61 Sole (sued under the name of Edgar Doe), defendants in this action, and, answering plaintiff's complaint herein, jointly allege:

I.

That the plaintiff herein was, at and before the filing of the complaint in this action, and now is, a citizen of the United States of America and a resident of the State of California.

II.

That all of the defendants herein were, at and before the filing of plaintiff's complaint, ever since have been, and now are, citizens of the United States of America and residents of the same State with plaintiff, to wit, the State of California.

III.

They deny that they are wrongfully in possession of the land, or any part of the lands set out and described in plaintiff's complaint; deny that they wrongfully withhold the possession thereof from plaintiff, but defendants allege that at the date of filing the complaint herein —, ever since have been, and now are occupying and enjoying the possession of the lands occupied and possessed by them,
62 which are claimed by and described in plaintiff's complaint by and with the consent of plaintiff, made and given to defendants by plaintiff's agent, one R. J. Northam, on or about the — day of June, 1882, and not otherwise.

IV.

Defendants allege that no notice from either plaintiff or his said agent has ever been given or served upon any of these defendants to quit and surrender said lands.

V.

Defendants allege that they are entitled to occupy and have a right to the possession of said lands described in the complaint occupied by them by reason and virtue of an agreement made and entered into by and between R. J. Northam, plaintiff's duly authorized agent, and these defendants on the — day of June, 1882, and that they now hold possession and enjoy the same by reason and virtue of the aforesaid agreement.

BRUNSON & WELLS,
Per W. V. D.,
Att'ys for Def'ts.

63 STATE OF CALIFORNIA,)
County of Los Angeles,) *ss:*

W. H. Sowle, being first duly sworn, on oath says that he is one of the defendants named in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on his information or belief, and that as to those matters he believe it to be true.

(S'g'd) W. H. SOWLE.

Subscribed and sworn to before me this 26th day of December, 1882.

[SEAL.] B. W. LEE,
Notary Public.

Endorsed: Service of the within answer is hereby admitted this 28th day of December, 1882. E. W. McGraw, attorney for plaintiff. Filed December 28, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

64 At a stated term, to wit, the February term, A. D. 1883, of the circuit court of the United States of America, of the

ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco on Tuesday, the 17th day of April, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order.

A. ROBINSON *vs.* JESSE ADKINSON *et al.*

On motion of E. W. McGraw, Esq., attorney for plaintiff, ordered leave granted to file amended complaint herein, and that depositions herein be opended and refiled.

Ordered cause continued until 11 a. m. to-morrow.

65 I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 17th day of April, A. D. 1883.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk*.

Stipulation.

In the U. S. Circuit Court.

ALFRED ROBINSON *v.* JESSE ADKINSON *et al.*

It is hereby stipulated and agreed that a jury be waived in the trial of said cause.

D'd April 17, 1883.

(S'g'd) E. W. McGRAW,
Att'y for Pl'ff.
BRUNSON & WELLS,
Per W. V. D.,
Att'ys for Certain Def'ts.

Endorsed: Filed April 17, 1883. L. S. B. Sawyer, clerk.

66 *Amendments to Complaint.*

Circuit Court of the U. S., Ninth Circuit, Dist. of Cal.

ALFRED ROBINSON *vs.* JESSE ADKINSON *et al.*

Now comes plaintiff and, by leave of the court first had and obtained, amends his complaint by substituting for the erroneous and fictitious names of defendants mentioned in the complaint the following, to wit:

For John Doe Clinton, Henry Clinton.
For Gus. Jones, William A. Jones.
For J. McDowell, John C. McDowell.
For Charles McManus, C. G. McManus.
For J. Neice, William J. Neice.
For Mrs. Jane Doe Sole, Celia Sole.

For L. Weimer, P. Weimer.
For Absalom Doe, Ira Weimer.
For Arthur Doe, R. R. McDowell.
For Bolivar Doe, Thomas Hambright.
For Charles Doe, Jesse Packwood.
For Edgar Doe, William H. Sole.
For Peter Brush, David Brush.
For J. Bushard, J. B. Bushard.
For J. Chapman, J. N. Chapman.
67 For John Farrar, J. N. Farrar.
For John Doe Garner, John Garner, Jr.
For R. McGarvin, Dennis McGarvin.
For C. R. Parris, C. R. Parish.
For G. R. Parish, M. T. Paine.
For G. Powers, John W. Powers.
For H. Rudolph, H. Randolph.
For Thompson Sears, Thomas Sears.
For John Doe Welch, S. Welch.
For Abram Doe, Oscar C. Blodgett.
For Annie Doe, Elizabeth A. Paine.
For Asa Doe, C. C. Gilbert.
For Beriah Doe, William Ward.
For Clarence Doe, Peter J. Farrar.
For Clement Doe, John D. Harrison.
For Daniel Doe, James B. Paine.
For Daniel Doe, Aaron Vandekerr.
For Edward Doe, John Paine.
For Frank Doe, Abraham W. McWilliams.
For George Doe, Hiram C. Churchill.

E. W. McGRAW,
Att'y for Pl'ff.

Endorsed: Filed April 18, 1883. L. S. B. Sawyer, clerk.

68 *Amended Answer of Certain Defendants.*

In the Circuit Court of the United States, 9th Circuit, District and State of California.

ALFRED ROBINSON, Plaintiff,
vs.
JESSE ADKINSON *et al.*, Defendants.

Now come Jesse Adkinson, A. F. Brown, N. W. Best, Charles Best, J. B. Bushard, T. G. Beauchamp, G. W. Cox, J. M. Chapman, Mrs. Mary English, John N. Farrar, Spencer Franklin, J. Greenia, John Garner, John Garner, Jr., H. W. Head, Mrs. Hannah H. Hambright, Charles Johnson, R. McGarvin, Henry Owens, Jno. W. Powers, H. Randolph, Thos. Sears, H. Salter, Thos. J. Williams, J. G. Walker, Silas Wright, W. M. Whitehead, D. W. Wells, James C. Palmer, Thos. Hambright, C. C. Gilbert, O. C. Blodgett, P. J. Farrar, and J. B. Pain, defendants in this action, and, answering plaintiff's complaint herein, allege:

I.

69 That the plaintiff herein was, at and before the filing of the complaint herein, and now is, a citizen of the United States and a resident of the State of California.

II.

That all of the defendants named in plaintiff's complaint herein were, at and before the filing of the complaint herein, and now are, citizens of the United States and residents of the State of California.

III.

These defendants deny that they are wrongfully in possession of the land, or any part of the land, set out and described in plaintiff's complaint, and deny that they wrongfully withhold the possession thereof from the plaintiff.

IV.

They allege that at the date of filing the complaint herein they were, ever since have been, and now are in the occupation and possession of certain tracts or parts of the land described in the plaintiff's complaint in severalty under and by virtue of written contracts for the conveyance of said several tracts of land so in the
70 possession of these defendants severally by the said plaintiff to said defendants, which said contracts were made and executed by said plaintiff on or about January, 1880, who delivered the same to these defendants severally, the tracts or portion so in the possession of these defendants severally being fully described and set forth in the contract so executed and delivered to each as aforesaid.

And these defendants aver that said contracts are and each of them is still in full force and effect.

And these defendants aver that they are entitled to occupy and possess said several tracts of land so in their possession by reason and virtue of said contracts of purchase, and they deny that they were or now are in possession of any other portions of the lands described in plaintiff's complaint.

Wherefore these defendants ask to be hence dismissed with costs.

BRUNSON & WELLS,
Att'ys for Defendants.

71 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

H. W. Head, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

(S'g'd) H. W. HEAD.

Subscribed and sworn to before me this 18th day of April, A. D. 1883.

L. S. B. SAWYER,
Comm'r U. S. Cir't Court, Dist. Cal.

Endorsed: Due service of the within am. ans'r is hereby admitted this 18th day of April, A. D. 1883. E. W. McGraw, attorney for pl'ff. Filed April 18th, 1883. L. S. B. Sawyer, clerk.

72 *Amended Answer of Certain Defendants.*

In the Circuit Court of the United States, 9th Circuit, District and State of California.

ALFRED ROBINSON, Plaintiff,
vs.
JESSE ADKINSON *et al.*, Defendants.

Now come John Anderson, Wm. Anderson, J. Brenot, H. W. Clark, M. A. Grooms, Wm. A. Jones, Jno. C. McDowell, Charles McDowell, L. Noel, Wm. J. Neice, Celia Sole, J. Taylor, P. Ulrich, P. L. Weimer, Ira Weimer, R. R. McDowell, W. H. Sole, Jesse Peckwood, defendants in this action, and, answering plaintiff's complaint herein, allege:

I.

That the plaintiff herein was, at and before the filing of the complaint herein, and now is, a citizen of the United States of America and resident of the State of California.

II.

That all of the defendants named in plaintiff's complaint herein were, at and before the filing of the said complaint, and now
73 are, citizens of the United States of America and residents of the State of California.

III.

They deny that they are wrougfully in possession of the lands or any part of the lands set out and described in plaintiff's complaint, and deny that they wrongfully withhold the possession thereof from plaintiff; but defendants allege that they, at the date of filing the complaint herein, were, ever since have been, and now are occupying and enjoying the possession of the lands occupied and possessed by them, which are claimed by and described in plaintiff's complaint, by and with the consent of plaintiff, made and given to defendants by plaintiff's agent, R. J. Northam, on or about the — day of June, 1882, and not otherwise.

IV.

These defendants allege that no notice from either plaintiff or his said agent has ever been given or served upon any of these defendants to quit or surrender said premises.

74 V.

These defendants allege that they are entitled to occupy and have a right to the possession of said lands described in the complaint occupied by them by reason and virtue of an agreement made and entered into by and between R. J. Northam, plaintiff's duly authorized agent, and these defendants on the — day of June, 1882, and that they now hold possession and enjoy the same by reason and virtue of the aforesaid agreement.

Wherefore these defendants ask to be hence dismissed with costs.

BRUNSON & WELLS,
Att'ys for Def'ts.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

G. Wiley Wells, being duly sworn, deposes and says that he is one of the attorneys for said defendants in the above-entitled
75 action; that he has read the foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true; that said defendants are absent from this country, and the facts stated in said amended answer are within the knowledge of deponent, who, therefore, verifies it for said defendants.

(S'g'd) G. WILEY WELLS.

Subscribed and sworn to before me this 18th day of April, A. D. 1883.

L. S. B. SAWYER,
Comm'r U. S. Cir't Court, Dist. Cal.

Endorsed: Due service of the within is hereby admitted this 18th day of April, A. D. 1883. E. W. McGraw, attorney for pl'ff. Filed April 18, 1883. L. S. B. Sawyer, clerk.

76 *Amended Answer of Certain Defendants.*

In the Circuit Court of the United States, 9th Circuit, District and State of California.

ALFRED ROBINSON, Plaintiff,

vs.

JESSE ADKINSON *et al.*, Defendants.

Now come John Barrett, Peter Brush, S. L. Chilson, Henry Clinton, John Dameron, J. M. Eddington, E. Howe, John Huntley, G. M. Holliday, J. W. Jones, Charles McManus, Mary Mefford, J. Mock, N. A. Palmer, C. R. Parrish, Muriel Paine, B. F. Stahl, J. A. Woodhouse, Lawrence Welsh, Gus. Schmitz, Wm. Ward, A. C. McWilliams, H. C. Churchill, A. Vandeckarr, defendants in this action, and, answering plaintiff's complaint herein, allege:

I.

That the plaintiff herein was, at and before the filing of the complaint herein, and now is, a citizen of the United States of America and resident of the State of California.

77 II.

That all of the defendants named in plaintiff's complaint herein were, at and before the filing of the said complaint, and now are, citizens of the United States of America and residents of the State of California.

III.

They deny that they are wrongfully or at all in possession of the lands named and set out in the complaint herein, or any part thereof, or that they wrongfully or at all withhold the possession thereof from plaintiff.

IV.

They deny that they were, at the date of the filing of the complaint herein, or at any time thereafter, or are now in possession or upon any portion of the lands described and set out in plaintiff's complaint, and deny that at the date of filing the complaint herein they did, or at any time thereafter have or now do, withhold from plaintiff the possession of any land or tract of land named
78 and described in plaintiff's complaint.

Wherefore these defendants ask to be hence dismissed with costs.

BRUNSON & WELLS,
Att'ys for Defendants.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

J. M. Edington, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

(S'g'd) J. M. EDINGTON.

Subscribed and sworn to before me this 18th day of April, A. D. 1883.

L. S. B. SAWYER,
Comm'r U. S. Circuit Court, Dist. Cal.

79 Endorsed: Due service of the within amended answer is hereby admitted this 18 day of April, A. D. 1883. E. W. McGraw, att'y for pl'ff. Filed April 18, 1883. L. S. B. Sawyer, clerk.

80 *Judgment.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

ALFRED ROBINSON *vs.* JESSE ADKINSON *et al.* } No. 2850.

This cause having come on regularly for trial on the 17th day of April, 1883, being a day in the February, 1883, term of said court, before the court sitting without a jury, a trial by jury having been waived by written stipulation of counsel for the respective parties hereto, duly filed with the clerk of said court, E. W. McGraw and L. D. Latimer, Esqs., appearing on behalf of plaintiff, and Walter Van Dyke and G. W. Wells, Esqs., on behalf of the defendants, and the court having, upon motion on behalf of defendants made upon upon the pleadings, ordered that this cause be dismissed for want of jurisdiction:

Now, therefore, by virtue of the law and by reason of the premises, it is considered by the court that the plaintiff take
81 nothing by this action; that the said defendants go hereof without day, and that said defendants recover from said plaintiff their costs in this behalf expended, taxed at ($86.65) eighty-six dollars and sixty-five cents.

Judgment entered April 18, 1883.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 18th day of April, A. D. 1883.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Filed April 18th, 1883.

L. S. B. SAWYER, *Clerk.*

82 *Clerk's Certificate to Judg't Roll.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

A. ROBINSON *vs.* JESSE ADKINSON *et al.*

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the therein-entitled action.

Witness my hand and the seal of said circuit court this 18th day of April, A. D. 1883.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk*.

Endorsed: Judgment roll. Filed April 18, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

83 *Bill of Exceptions.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

ALFRED ROBINSON, Plaintiff,
vs.
JESSE ADKINSON *et al.*, Defendants.

Be it remembered that on April 18th, 1883, the above case was duly called for trial by the court (a jury having been expressly waived), E. W. McGraw and L. D. Latimer, Esqs., appearing for the plaintiff, and G. Wiley Wells and Walter Van Dyke, Esqs., appearing for the following-named defendants, whose answers and amended answers had been duly filed—that is to say: For John Anderson, William Anderson, J. Brenot, A. W. Clark, M. A. Grooms, Wm. A. Jones, Jno. C. McDowell, Chas. McDowell, L. Noel, Wm. J. Neice, Celia Sole, J. Taylor, P. Ulrich, P. L. Weimer, Ira Weimer, R. R. McDowell, W. H. Sole, Jesse Packwood, John Barrett, Peter Brush, S. L. Chilson, Henry Clinton, John Dameron, J. M. Edington, E. Howe,
84 John Huntley, G. W. Holliday, J. W. Jones, Charles McManus, Mary Mefford, J. Mock, N. A. Palmer, C. R. Parrish, Muriel Payne, B. F. Stahl, J. A. Woodhouse, Lawrence Welch, Gus. Schmitz, Wm. Ward, A. C. McWilliams, H. C. Churchill, A. Vandekarr, Jesse Adkinson, A. L. Brown, N. W. Best, Charles Best, J. B. Bushard, F. G. Beauchamp, G. W. Cox, J. M. Chapman, Mrs. Mary English, Jno. N. Farrar, Spencer Franklin, J. Greenia, John Garner, John Garner, Jr., H. W. Head, Mrs. Hannah H. Hambright, Charles Johnson, R. McGarvin, Henry Owens, Jno. W. Powers, H. Randolph, Thos. Sears, H. Salter, Thos. J. Williams, J. G. Walker, Silas Wright, W. M. Whitehead, D. W. Wells, James C. Palmer, Thomas Hambright, C. C. Gilbert, O. C. Blodgett, P. J. Farrar, and J. B. Rain; and the said cause being called for trial, and both parties being ready, the said attorneys for said defendants made a motion that the action be dismissed, for the reason that it appears by the pleadings that the court has no jurisdiction of the persons of the defendant- or the subject-matter of the action, and the court
85 thereupon granted said motion and made an order dismissing said action; to which ruling of the court and to which order plaintiff, by his counsel, then and there duly excepted.

And because the foregoing matters do not appear of record this bill of exceptions is settled and signed by and by me hereby certified to be true and correct this 20th day of April, 1883.

(Signed) LORENZO SAWYER,
Circuit Judge.

Endorsed: Filed April 20th, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

86 *Bond on Writ of Error.*

In the Supreme Court of the United States.

ALFRED ROBINSON, Plaintiff in Error,
vs.
JESSE ADKINSON and Others, Defendants in Error.

Know all men by these presents that we, Edward W. McGraw and William A. Aldrich, are held and firmly bound unto John Anderson, William Anderson, J. Brenot, H. W. Clark, M. A. Grooms, William A. Jones, John C. McDowell, Charles McDowell, L. Noel, William J. Niece, Celia Sole, J. Taylor, P. Ulrich, P. L. Weimer, Ira Weimer, R. R. McDowell, W. H. Sole, Jesse Packwood, John Barrett, Peter Brush, S. L. Chilson, Henry Clinton, John Dameron, J. M. Edington, E. Howe, John Huntley, G. W. Holliday, J. W. Jones, Charles McManus, Mary Mefford, J. Mock, N. A. Palmer, C. R. Parrish, Muriel Paine, B. F. Stahl, J. A. Woodhouse, Lawrence Welch, Gus. Schmitz, William Ward, A. C. McWilliams, H. C. Churchill, A. Vandekarr, Jesse Adkinson, A. L. Brown, N. W. Best, Charles Best, J. W. Bushard, J. F. G. Beauchamp, G. W. Cox,
87 J. M. Chapman, Mrs. Mary English, John N. Farrar, Spencer Franklin, J. Greenia, John Garner, John Garner, Jr., H. W. Head, Mrs. Hannah H. Hambright, Charles Johnson, R. McGarvin, Henry Owens, John W. Powers, H. Randolph, Thomas Sears, H. Salter, Thomas J. Williams, J. G. Walker, Silas Wright, W. M. Whitehead, B. W. Wells, James C. Palmer, Thomas Hambright, C. C. Gilbert, O. C. Blodgett, P. J. Farrar, and J. B. Rain, their executors or administrators, in the sum of five hundred dollars, lawful money of the United States; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated June 2d, A. D. 1883.

Whereas the above-named Alfred Robinson has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the action entitled Alfred Robinson *versus* Jesse Adkinson *et al.* (No. 2850) by the circuit court of the
88 United States in and for the District of California:

Now, therefore, the condition of this obligation is such that if said Alfred Robinson shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his said plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) EDWARD W. McGRAW. [SEAL.]
WILLIAM A. ALDRICH. [SEAL.]

Signed, sealed, and delivered in presence of—
JOS. F. O'BEIRNE.

UNITED STATES OF AMERICA, } ss:
District of California, }

Edward W. McGraw and William A. Aldrich, being duly sworn, each for himself deposes and says that he is a resident and householder in said district and is worth the sum of five hundred dollars, lawful money of the United States of America, over and above
89 all his just debts and liabilities and exclusive of property exempt from execution.

(Signed) EDWARD W. McGRAW.
WILLIAM A. ALDRICH.

Subscribed and sworn to before me this 2d day of June, A. D. 1883.

JOS. F. O'BEIRNE,
Comm'r of U. S. Circuit Court, District of California.

Endorsed: I hereby approve the within bond & the sufficiency of the sureties thereon. Dated June 2d, 1883. (Signed) Ogden Hoffman, dist. judge. Filed June 2d, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

90 Circuit Court of the United States, Ninth Circuit, District of California.

ALFRED ROBINSON, Plaintiff in Error,
vs.
JESSE ADKINSON *et al.*, Defendants in Error. } No. 2850.

I, L. S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing eighty-nine written pages, numbered from 1 to 89, inclusive, are a full, true, and correct copy of the record and of all proceedings in the therein-entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and seal of said circuit court this 25th day of June, A. D. 1883.

[The Seal of the Circuit Court, District of Cal'a.]

L. S. B. SAWYER, *Clerk.*

91 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Alfred Robinson, plaintiff in error, and John Anderson, William Anderson, J. Brenot, H. W. Clark, M. A. Grooms, William A. Jones, John C. McDowell, Charles McDowell, L. Noel, Wil-

liam J. Niece, Celia Sole, J. Taylor, P. Ulrich, P. L. Weimer,
92 Ira Weimer, R. R. McDowell, W. H. Sole, Jesse Packwood, John Barrett, Peter Brush, S. L. Chilson, Henry Clinton, John Dameron, J. M. Edington, E. Howe, John Huntley, G. W. Holliday, J. W. Jones, Charles McManus, Mary Mefford, J. Mock, N. A. Palmer, C. R. Parrish, Muriel Paine, B. F. Stahl, J. A. Woodhouse, Lawrence Welch, Gus. Schmitz, William Ward, A. C. McWilliams, H. C. Churchill, A. Van de Karr, Jesse Adkinson, A. L. Brown, N. W. Best, Charles Best, J. W. Bushard, J. F. G. Beauchamp, G. W. Cox, J. M. Chapman, Mrs. Mary English, John N. Farrar, Spencer Franklin, J. Greenia, John Garner, John Garner, Jr., H. W. Head, Mrs. Hannah H. Hambright, Charles Johnson, R. McGarvin, Henry Owens, John W. Powers, H. Randolph, Thomas Sears, H. Salter, Thomas J. Williams, J. G. Walker, Silas Wright, W. M. Whitehead, B. W.
93 Wells, James C. Palmer, Thomas Hambright, C. C. Gilbert, O. C. Blodgett, P. J. Farrar, and J. B. Rain, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District
94 of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be[ing] inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second day of June, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh.

[The Seal of the Circuit Court, District of Cal'a.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk*.

The above writ of error is hereby allowed.

OGDEN HOFFMAN, *Dist. Judge*.

95 *The Answer of the Judges of the Circuit Court of the United States for the District of California.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said circuit court to the Supreme Court of the United States within mentioned at the day and place within contained in

a certain schedule to this writ annexed, as within we are commanded.

By the court:

[The Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

96 [Endorsed:] No. 2850. Supreme Court of the United States. Alfred Robinson, pl'ff in error, *vs.* Jesse Adkinson *et al.*, def'd'ts in error. Writ of error. Filed June 2d, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

97 UNITED STATES OF AMERICA, *ss*:

To John Anderson, William Anderson, J. Brenot, H. W. Clark, M. A. Grooms, William A. Jones, John C. McDowell, Charles McDowell, L. Noel, William J. Niece, Celia Sole, J. Taylor, P. Ulrich, P. L. Weimer, Ira Weimer, R. R. McDowell, W. H. Sole, Jesse Packwood, John Barrett, Peter Brush, S. L. Chilson, Henry Clinton, John Dameron, J. M. Edington, E. Howe, John Huntley, G. W. Holliday, J. W. Jones, Charles McManus, Mary Mefford, J. Mock, N. A. Palmer, C. R. Parrish, Muriel Paine, B. F. Stahl, J. A. Woodhouse, Lawrence Welch, Gus. Schmitz, William Ward, A. C. McWilliams, H. C. Churchill, A. Van de Karr, Jesse
98 Adkinson, A. L. Brown, N. W. Best, Charles Best, J. W. Bushard, J. F. G. Beauchamp, G. W. Cox, J. M. Chapman, Mrs. Mary English, John N. Farrar, Spencer Franklin, J. Greenia, John Garner, John Garner, Jr., H. W. Head, Mrs. Hannah H. Hambright, Charles Johnson, R. McGarvin, Henry Owens, John W. Powers, H. Randolph, Thomas Sears, H. Salter, Thomas J. Williams, J. G. Walker, Silas Wright, W. M. Whitehead, B. W. Wells, James C. Palmer, Thomas Hambright, C. C. Gilbert, O. C. Blodgett, P. J. Farrar, and J. B. Rain, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of
99 October, A. D. 1883, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, wherein Alfred Robinson is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second day of June, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh.

[The Seal of the Circuit Court, District of Cal'a.]

OGDEN HOFFMAN,
Dist. Judge.

100 [Endorsed:] No. 2850. Supreme Court of the United States. Alfred Robinson, pl'ff in error, *vs.* Jesse Adkinson *et al.*, def'd'ts in error. Citation. Rec'd copy of within this June 6, 1883. Brunson & Wells, per V. D., att'ys for def'd'ts in error. Filed June 6th, 1883. L. S. B. Sawyer, clerk, per J. F. O'Beirne, dep'y cl'k.

Endorsed on cover: California C. C. U. S. No. 231. Alfred Robinson, plaintiff in error, *vs.* John Anderson, William Anderson, Jesse Adkinson, *et al.* Filed 15th February, 1884.

IN THE SUPREME COURT OF THE UNITED STATES;

OCTOBER TERM, 1886.

No. 231.

ALFRED ROBINSON, PLAINTIFF IN ERROR,

vs.

JOHN ANDERSON, WILLIAM ANDERSON, JESSE ADKINSON, ET AL., DEFENDANTS IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The action is ejectment to recover a large tract of land, portion of the Rancho Las Bolsas in Los Angeles County, California, and $30,000 damages for detention of same. The land is alleged to be of the value of over $6,000, and the rents and profits to be of the value of $1,000 a month. (Transcript, page 4.) Jurisdictional facts are alleged in the complaint as follows (Transcript, pp. 4–7):

"That said lands are generally known and designated as a portion of the *Rancho Las Bolsas*, and situated in Los Angeles County, California.

That said *Rancho Las Bolsas* is a portion of a larger tract of land granted in 1784 by Pedro Fajes, then Spanish Governor of California, to Manuel Nieto, and occupied by him.

That in 1834 José Figueroa, then Mexican Governor of California, by way of partition of said larger tract of land, re-granted the same in segregated portions to the several heirs of said Manuel Nieto; that the particular portion thereof then and now called the *Rancho Las Bolsas* was re-granted as aforesaid by said Figueroa to Catarina Ruiz, widow of said Manuel Nieto.

That upon petition duly presented to the Board of Land Commissioners, created by the Act of Congress of the United States, passed March 3d, 1851, entitled "An Act to ascertain and settle the private land claims in the State of California," the claim to the undivided half of said *Rancho Las Bolsas*, was, on the 26th day of September, 1854, by the decree of said Commissioners, confirmed to Ramon Yorba, Domingo Yorba, Soledad Yorba de Abila, wife of Juan Abila, Dolores Yorba de Aguilar, wife of Christobal Aguilar, and Julian Chaves, the successors in interest of said Catarina Ruiz as to said un-

d one half; that said decree became final; and on the 19th day ne A. D. 1874, the patent of the United States was issued to aid confirmees for said undivided one half.

That by a final decree of the United States District Court for the Southern District of California, duly rendered upon an appeal from a decree of said Board of Land Commissioners, the claim to the other undivided one half of said *Rancho Las Bolsas* was confirmed to José Justo Morillo, and Maria Cleofas Nieto, his wife, on the 17th day of February, 1857, and the patent of the United States was issued to said confirmees for said other undivided half on the 27th day of August A. D. 1877.

That plaintiff is the owner of said lands by mesne conveyances from the confirmees and patentees aforesaid.

That this action is brought to recover possession of the said lands and premises hereinafter described, and thirty thousand dollars damages for the use and occupation of the same during the pendency of the action.

That this action arises under the laws of the United States, and the treaty known as the treaty of Guadalupe Hidalgo.

The particular questions which will arise in said case, under said laws, and said treaty, are as follows:

Plaintiff claims that the patents aforesaid, by a true and proper construction thereof, include the lands in controversy, which claim defendants deny.

Plaintiff claims that the patents aforesaid are conclusive upon the question of title and right of possession to said lands, which claim defendants deny.

The defendants claim to be owners of undivided interests in such portion of the Rancho Santiago de Santa Ana as is not included in the Hancock survey of said Rancho hereinafter referred to. Plaintiff denies that there is any portion of said Rancho not included in said survey.

Said Rancho Santiago de Santa Ana, adjoins the Rancho Las Bolsas on the east, was granted by José Joaquin de Arrillago, Spanish Governor of California, to Antonio Yorba, in 1810, and the grant was finally confirmed to Bernardo Yorba, and others, by the said Land Commissioners, July 10th, 1855.

Defendants claim that the land hereinafter described is not within the decree of confirmation or the patented boundaries of Las Bolsas, and is within the decree of confirmation of the Rancho Santiago de Santa Ana.

They claim also, that if the ranchos overlap, that the grant of the Rancho Santiago de Santa Ana is the earlier grant and has precedence over that of Las Bolsas.

They claim also that they are "third persons" as to whom the patents of Las Bolsas are not conclusive, under the Act of Congress of the United States first hereinafter referred to.

That plaintiffs contest and deny each and every of said claims made by the defendants.

In the determination of the questions involved, a construction of the Act of Congress of the United States, entitled "An Act to ascertain and settle private land claims in the State of California," passed

March 3, 1851, and especially of Sections 13 and 15 of said Act, a construction of the patents aforesaid to the Rancho Las Bolsas; a construction of the decree of confirmation of the Rancho Santiago de Santa Ana, and a construction of the treaty of Guadalupe Hidalgo, and especially of Articles VIII. and IX. of said treaty will be and become necessary.

Plaintiff further saith that the Rancho Santiago de Santa Ana was duly surveyed by Henry Hancock, Deputy United States Surveyor for California, in November and December, 1857; that said survey was duly approved by the United States Surveyor-General for California, Mandeville, June 13, 1859, and was by him, in the same year, duly advertised according to law, and no objections were made or filed thereto. That afterward and in October, 1874, said survey was duly re-advertised by the United States Surveyor-General for California, Stratton, under the provisions of the Act of Congress, entitled: "An act to expedite the settlement of titles of lands in the State of California," approved July 1st, 1864. That no objections were filed to said survey within the time allowed by said Act of Congress; and that according to said survey by said Hancock, the westerly line of said Rancho Santiago de Santa Ana, and the easterly line of the said Rancho Las Bolsas, as described in the patents aforesaid, are the same and identical.

That on March 4th, 1878, John Huntley, J. M. Ellington, W. H. Morrow, and José Antonio Yorba filed in the office of the Surveyor-General of California a protest and objection to said Hancock Survey, claiming it to be incorrect in various particulars.

That on January 4, 1879, United States Surveyor-General Wagner transmitted to the Commissioner of the General Land Office, the plat and field notes of said Hancock Survey, together with the said protest thereto, together with a letter expressing his own opinion that the survey was incorrect.

On May 25th, 1882, the Commissioner of the General Land Office refused to approve of said survey, and ordered a new survey in accordance with certain instructions given by him.

That the Hancock Survey excluded the lands in controversy from the Santa Ana grant. That the new survey ordered by the Commissioner, would, if made according to his instructions, include a large portion and perhaps the whole of said lands within that grant, as plaintiff is informed and believes, and would cause the two grants to over-lap.

That immediately on the announcement of said decision of the Land Commissioners defendants entered upon said lands and ousted E. P. Whitmore, the then tenant of plaintiff, from the possession thereof, claiming a right to make such entry, and a justification thereof under the said decision of the Commissioner of the General Land Office, and as claimants of undivided interests of the Rancho Santiago de Santa Ana, as aforesaid.

Plaintiff further saith that the Commissioner of the General Land Office derives all his powers and authority from the laws of the United States.

Plaintiff claims that the said Commissioner had no power or jurisdiction under the laws of the United States, hereinbefore referred to,

or under any other law of the United States, to refuse to approve the said Hancock Survey, or to order a new survey of said Rancho Santiago de Santa Ana; that by virtue of the proceedings hereinbefore recited the said Hancock Survey of the Rancho Santiago de Santa Ana, become a finalty; which claim defendants deny. A determination of said questions involved in the case will necessarily call for a construction of said Act of Congress, entitled, " An act to expedite the settlement of titles to lands in the State of California;" and particularly of Section One of said Act; and also of the acts and laws of the United States, creating and prescribing the duties of the office of Commissioner of the General Land Office, and also of the acts, decrees, patents and treaty hereinbefore referred to."

The complaint was verified. (page 15.)

To this complaint defendants first filed a plea in abatement upon which issue was joined, but the plea was withdrawn and a demurrer interposed instead. (pages 16-17.)

The demurrer interposed was on various grounds—one being that the Circuit Court had not jurisdiction, either by reason of the residence of the parties or of a question arising under the laws or treaties of the United States. (page 18.)

The demurrer was overruled. (page 17.)

Defendants severed in their defense and filed two answers (pp. 19 and 21). It is needless to consider these answers here, as amended answers superseded them.

Plaintiff, by leave of the Court, filed amendment to complaint substituting real names for fictitious and erroneous names (page 23).

Defendants then, by leave of the Court, filed their amended answers.

Jesse Atkinson and thirty-three other defendants answered, alleging that at commencement of action plaintiff was a citizen of the United States, resident in California, and that defendants were also citizens of the United States and residents of California; they deny that they are *wrongfully* in possession of any part of the land described in the complaint, and deny that they *wrongfully* withhold possession of such land from plaintiff.

But the gist of the answer is in the following averment:

"They allege that at the date of filing the complaint herein, they were ever since, have been, and now are, in the occupation and possession of certain tracts or parts of the land described in the plaintiff's complaint in severalty under and by virtue of written contracts for the conveyance of said several tracts of land so in the possession of these defendants severally, by the said plaintiff to said defendants, which said contracts were made and executed by said plaintiff on or about January, 1880, who delivered the same to these defendants severally, the tracts or portions so in the possession of these defendants severally being fully described and set forth in the contract so executed and delivered to each as aforesaid.

"And these defendants aver that said contracts are, and each of them is still, in full force and effect.

"And these defendants aver that they are entitled to occupy and possess said several tracts of land so in their possession by reason and virtue of said contracts of purchase; and they deny that they were, or now are, in possession of any other portions of the lands described in the plaintiff's complaint." (Transcript, p. 25.)

The defendant John Anderson and seventeen others answered, alleging that all parties to the action were citizens of the United States and residents of the State of California, and then allege as follows:

"They deny that they are wrongfully in possession of the lands, or any part of the lands set out and described in plaintiff's complaint, and deny that they wrongfully withhold the possession thereof from plaintiff; but defendants allege, that they, at the date of filing the complaint herein, were, ever since have been, and now are, occupying and enjoying the possession of the lands occupied and possessed by them, which are claimed by and described in plaintiff's complaint, by and with the consent of plaintiff, made and given to defendants by plaintiff's agent, R. J. Northam, on or about the day of June, 1882, and not otherwise.

These defendants allege that no notice from either plaintiff, or his said agent, has ever been given or served upon any of these defendants to quit or surrender said premises.

These defendants allege that they are entitled to occupy and have a right to the possession of said lands described in the complaint, occupied by them by reason and virtue of an agreement made and entered into by and between R. J. Northam, plaintiff's duly authorized agent, and these defendants on the day of June, 1882, and that they now hold possession and enjoy the same by reason and virtue of the aforesaid agreement." (Transcript, pp. 26 and 27.)

Defendant John Barrett and twenty-three others filed amended answer, alleging that plaintiff and defendants were citizens of the United States, resident in California, and then allege as follows:

"They deny that they were, at the date of the filing of the complaint herein, or at any time thereafter, or are now, in possession or upon any portion of the lands described and set out in plaintiff's complaint, and deny that at the date of filing the complaint herein they did, or at any time thereafter, have, or now do withhold from plaintiff the possession of any land, or tract of land, named and described in plaintiff's complaint." (Transcript, pp. 28 29.)

On these pleadings the case was called for trial before the Court, a jury being waived, and thereupon the defendants, by their counsel, moved the Court, "that the action be dismissed, for the reason that it appears by the pleadings that the Court has no jurisdiction of the persons of the defendants or of the subject-matter of the action;" and the Court thereupon granted said motion, and made an order dismissing said action, to which ruling of the Court plaintiff, by his counsel, then and there duly excepted. (Transcript, p. 30.)

Judgment for defendants was entered on the order (Tr., p. 29), and plaintiff sued out writ of error.

The case comes up on the judgment roll and bill of exceptions.

Assignment of Errors.

The Court erred in granting the motion of defendants to dismiss the action.

ARGUMENT.

May it please the Court:

The motion was made and granted to dismiss this action "for the reason that it appears by the pleadings that the Court has no jurisdiction of the persons of the defendants, or the subject matter of the action." The defendants, resident in the District of California, were duly served with summons in said district, and appeared generally in the action by their attorneys of record. The subject matter of the action was the recovery of certain lands within the territorial jurisdiction of the Circuit Court.

If the Circuit Court had no jurisdiction of the *case* it was not because of any privilege of defendants which exempted them from service of process, nor of any defect in the proceedings by which jurisdiction is acquired of the person of a defendant, nor was it because the cause of action was such as to be locally beyond the cognizance of the Court. The Court below then on granting the motion must have based its decision upon one of two grounds:

First. That the complaint itself does not state facts which bring this case within the terms of the Act of Congress of March 3, 1875, determining the jurisdiction of Circuit Courts, or

Second. That the complaint did state sufficient facts, but that subsequently other facts were disclosed by the pleadings, which ousted the Court of its jurisdiction properly acquired by the filing of a sufficient complaint and the issuing of process therein.

It becomes necessary to consider both of these supposed grounds of dismissal.

I.

Did the complaint state facts sufficient to bring the case within the jurisdiction of the Circuit Court under the Act of Congress of 1875.

No attempt is made in the complaint to allege a jurisdiction founded upon the status, citizenship or residence of the parties. Upon that point it may be conceded that all the parties were citizens and residents of the District of California.

The complaint does attempt to allege matters in dispute arising under the laws of the United States and treaties made by their authority.

Upon their first appearance in the case the defendants joined issue with us upon the question whether we had sufficiently stated said matters to enable the Court to take jurisdiction. They attempted to raise such an issue by plea in abatement, but finding on the hearing of such plea that it did not properly raise the question, they, after argument upon the question of jurisdiction, had leave to withdraw their plea and file demurrer, which demurrer was overruled by the Court (transcript, pp. 16–18,) and defendants had leave to answer, of which they duly availed themselves.

It is a fair presumption then, that when the Circuit Court finally decided to dismiss the action, that it was upon the second ground above stated, as the first had been separately and definitely passed upon in our favor, and if the Court had changed its opinion in that respect it would rather have given us leave to amend, than have dismissed the action on the ground that a demurrer which it had overruled was well taken.

The allegations of the complaint in respect to these jurisdictional matters are fully hereinbefore recited, and it will be seen that it is alleged that plaintiff and defendants are claimants under adjacent and possibly overlapping Mexican grants, and that the rights of the parties are dependant upon the settlement of matters which are in dispute between them, and which arise under the laws of the United States and the treaty of Guadalupe Hidalgo, as follows:

1st. As to whether or not, upon a proper construction of the patents of the Rancho Las Bolsas, the lands sought to be recovered are a part of said rancho.

2d. As to whether or not, upon a proper construction of the grant and decree of confirmation of the Rancho Santiago de Santa Ana, the lands sought to be recovered are a portion of said rancho.

3d. As to whether or not said two ranchos overlap.

4th. As to which of the two is the controlling and precedent grant.

5th. As to whether or not the patents of the Las Bolsas Rancho are conclusive evidence of title on behalf of plaintiff as against the defendants, claiming under an unpatented grant.

6th. As to whether or not the survey of the Rancho Santiago de Santa Ana made by Hancock, became a final survey under the laws of the United States, and as to whether or not the Commissioner of the General Land Office exceeded his authority and jurisdiction under the laws of the United States, when he set aside said survey and ordered a resurvey of said rancho.

It is alleged that the determination of the questions calls necessarily for the construction of various sections of the "Act to ascertain and settle private land claims the in State of California," passed March 3, 1851,—of the Act to expedite the settlement of titles of lands in the State of California, approved July 1st, 1864, of various articles of the treaty of Guadalupe Hidalgo, and of the Acts of Congress under which the Commissioner of the General Land Office derives his powers and jurisdiction.

We think it must be fully apparent from an inspection of the record, that so far as jurisdiction of the case rested upon allegations of the complaint, the Circuit Court had full and complete jurisdiction to hear and determine it.

It could not be successfully contended that plaintiff, claiming solely ~~upon~~ under patents of the United States to a Mexican grant, and the defendants claiming adversely to said patents and under another but unpatented Mexican grant, that the rights of the parties could be determined without a judicial interpretation of the term "third persons" as used in section 15 of the Act of March 3, 1851, thus * * * "any patent to be issued under this Act shall be conclusive

13th. That plaintiffs claim and defendants deny that by operation of law the Hancock survey had become a finality and that the Commissioner of the General Land Office had no power or jurisdiction to set the same aside and order a new survey.

14th. That the determination of the various questions aforesaid will involve a construction of the Act to ascertain and settle private land claims, etc., of the Act to expedite the settlement of titles, etc., of the treaty of Guadalupe Hidalgo, of the two patents of the Las Bolsas, of the decree of confirmation of the Santiago de Santa Ana and of laws of the United States creating and prescribing the duties of the Commissioner of the General Land Office.

In other words, every allegation of jurisdictional fact contained in the complaint is admitted to be true by the answers of the defendants.

The admission of title in plaintiff, and the other admissions are not consistent, but in California a defendant may be as inconsistent in his answer as his conscience will permit.

Buhne *vs.* Corbett, 43 Cal., 264.

In addition to these admissions resulting from the absence of denials of the allegations of the complaint, the first of the answers as hereinbefore recited, alleges that the defendants therein named are in possession severally of separate tracts of land, portions of the land sued for, under contracts for conveyance of such lands made by plaintiff with such defendants severally, and claim a right to occupy under such contracts.

The second of the answers avers that the defendants therein named are in possession under license from the agent of plaintiff and have not been notified to quit.

The third of the answers denies possession of the defendants therein named of any portion of the lands in controversy.

The Code of California does not provide for a replication, and the new matter contained in the first and second of the answers aforesaid is deemed to be denied.

If we correctly understand the oral decision of the Court below upon the motion to dismiss, it was to the effect that the *issues* presented by the answers did not involve any Federal questions, and, therefore, the Court had not jurisdiction of the case.

The decision of the Court below presents a most important question of practice, perhaps the most important that has arisen under the Act of 1875.

It is a decision which, if fortified by the concurrence of this Court, will be found so prolific of grave results, that it merits the most careful scrutiny and examination.

The proposition is, that *a defendant may plead himself out of Court;* that, being brought there against his will, he may remain or not at his option.

We think it must be manifest that if this ruling of the Court below be maintainable, that in all cases arising under the patent or copyright laws; in all cases brought under the act of 1875, on the ground that a Federal question is involved, or between citizens of the same State claiming lands under different States, the jurisdiction of the Circuit Court is made dependant, not on the facts respecting which the jurisdiction is invoked by the plaintiff, but upon the will of the defendant in so pleading as to make or not make an *issue* upon the facts alleged.

In patent or copyright cases the defendant may always plead the use or sale of the protected article under *license* from the plaintiff. The question of license or no license is not a Federal question, and no issue is presented that the Court can try. The Court, by the mere allegation of what may be an absolute falsehood, loses its jurisliction to enquire into the truth of the answer.

In all actions brought for recovery of lands sold under the Act of 1862 for the collection of direct taxes in insurrectionary districts (of which there have been several in this Court), it would always be within the power of the defendant to plead that he held the land under and by virtue of a conveyance from plaintiff; and such plea not presenting any Federal question for adjudication, plaintiff would be debarred the privilege of exposing its falsity.

It is difficult to conceive of any case where the jurisdiction of the Circuit Court is invoked by a plaintiff upon the ground of questions arising under the Constitution, laws, or treaties of the United States, in which it would not be entirely possible for the defendant to so frame his answer as to obtain a substantial victory on his pleadings, absolved from the awkward necessity of substantiating them by proof.

In the present case, if it should be the fact that there were no contracts, no licenses, and that defendants were all in possession at the commencement of the action, we should have the singular spectacle of a plaintiff with a perfect cause of action properly presented, defeated, not because he had mistaken the law, nor by errors of his counsel, nor by perjury of witnesses, nor by verdict of jury or finding of Court against him on the facts, but by the plain and simple and easy method of alleging a falsehood in an answer filed.

We respectfully submit that the rule adopted by the Court below leaves the Court defenseless against imposition and imposture. That it would be provocative of reckless and untruthful pleading there can be little doubt. This very case affords an illustration of that recklessness which this new rule of practice would encourage.

Originally the defendants filed two answers, both verified; the one alleging possession under a license, and the other denying possession. (Transcript, pp. 19-21.)

These original answers were superseded by the three amended answers heretofore set forth, all verified, in one of which the allegation of possession under a contract for conveyance for the first time appears in the case. A comparison of the original and amended answers discloses that of the thirty-four defendants who, by the verified amended answer, discover that they are in possession under contract, all but two (H. Salter and Thomas Hambright) denied in the

verified original answer that they were in possession at all, and Salter and Hambright, in the original answer, were in possession under license; that of the defendants, who, according to the amended answer, are in possession under license—one (P. Ulrich), according to the original answer, was not in possession, and that of the defendants, who, according to the amended answer, are not in possession, four (H. Clinton, Charles McManus, Mary Mefford and N. A. Palmer) were, according to the original answer, in possession under license.

In the case at bar, the ruling of the Circuit Court was, that the defendants, by their mere pleading, had accomplished the defeat of the action.

Upon the broad question whether or not in *any* case, a defendant may avoid enforcement of his contract or escape the penalties of his wrong doing, by mere words in form of an answer, we ask the opinion and decision of this Court.

In rendering the decision dismissing the action, the learned Judge of the Circuit Court was perhaps influenced by a misconstruction of an expression of opinion appearing in a decision of this Honorable Court, but not pertaining to the case then before it.

The case of Hartell *vs.* Tilghman, 99 U. S., 547, was a suit for injunction and damages for infringement of a patent.

In the bill the complainant, anticipating the defense, alleged the existence of a former contract with defendant for the use of the patented article, a breach of the contract by defendant and the termination of the contract thereupon.

The answer admitted the *validity* and use by defendant of the patent and his liability to plaintiff for a royalty under the contract, setting out the contract as claimed by him, and claiming its continued vitality. The case was heard in the Court below on the pleadings and the evidence, and a judgment rendered for the complainant.

Upon appeal to this Court five of the Honorable Justices concurred in holding, that on the pleadings *and the evidence* the case did not arise under the patent laws of the United States, reversed the judgment of the Court below, and ordered the bill dismissed. Three of the Justices dissented from the opinion of the majority and one Justice took no part in the decision.

The judgment of this Court in that case ordering a dismissal because it appeared from the pleadings *and evidence* that the real matter at issue between the parties, involved the solution of no question arising under the patent laws, certainly is not authority warranting a dismissal because the possibly false answer of a defendant tenders an issue upon no federal question, but in the course of the decision Mr. Justice Miller speaking for the majority of the Court uses this language (p. 549):

"If a man owning a tract of land, his title to which is a patent from the United States should sell or lease that land, and a controversy should arise between him and his vendee or lessee as to their rights in the premises, it could not be said that any suit brought by the vendor to assert his rights, was a suit arising under the land

laws of the United States; *and this would be beyond question if the defendant admitting the title of plaintiff to the land should make no other defense than such as was derived from plaintiff by contract.*"

We do not imagine that in using the foregoing language, the learned Justice had at all in his mind the possibility of dismissing a case of which the Court had theretofore apparent jurisdiction, upon a mere allegation in an answer of defendant, of such contract and his claim of right thereunder.

Yet, as ejectment is in many parts of the country a very common form of enforcing a contract for sale of land, and in view of the decision of the Circuit Court in this case, we can see that the opinion as expressed may convey a very different idea from that which was in the mind of the writer; but we respectfully submit that a construction of that opinion such as would constitute it authority for the decision of the Court below in this case, would be an erroneous construction, and would lead to results by no means anticipated by the majority of this Court concurring in the disposition of Hartell *vs.* Tilghman. In that opinion the learned Justice supposes as a fact that the plaintiff had conveyed or leased a portion of his land; that a controversy had arisen respecting the rights of the parties under the lease or conveyance, and that suit had been brought by the plaintiff *to enforce his rights thereunder.*

But it is not to be presumed that it was intended that these facts which are *assumed* as the basis of the illustrative case, could in actual practice be established by other than the usual methods—admission of the parties or proof before Court or jury.

If, in this case, there could be eliminated from the first answer hereinbefore set forth the admissions of the defendants that they claimed title adversely to plaintiff under another and different source of title, and it should have appeared in *evidence* that plaintiff had in fact contracted to convey the lands to defendants, and that the only controversy between them was as to their respective rights under the contract, we should have had a case similar to the one supposed. But if it appeared in evidence that there was no such contract, or that such contract having been made, thereafter the defendants had utterly repudiated it, purchased an adverse title and claimed under it, and that the real question in controversy was, as to which of the claims of title, plaintiff's or defendant's was valid, and the solution of that question involved the construction of laws and treaties of the United States, we should have a case wholly dissimilar from that supposed by the learned Justice.

The nature of the *actual* controversy between the parties could be ascertained only from evidence, and the answer of defendants was not evidence.

The case of Hartell *vs.* Tilghman did not arise under the Act of 1875, and we submit that Mr. Justice Bradley in his dissenting opinion in that case, correctly stated the general rule of law as to the effect of an answer of defendant, as it existed prior to the passage of that act. To show the proper connection of his remarks, we quote a portion of the opinion on the controverted matters in that case, but the rule as stated by him, we do not understand to conflict with the opinion of the majority of the Court.

He said, p. 555: "The cause of action or ground of relief is the infringement of the patent. The plaintiff chooses to place himself on that ground alone. By doing so he runs the risk of every defense which would show a right to use the invention, whether license from himself, invalidity of the patent, non-infringement or any other proper defense to a suit on the patent. He states in his bill as he had a right to do by the rules of equity pleading, what the supposed defense would be and answers it This anticipation of the defense does not change the nature of the suit in the least. Perhaps he need not have anticipated the defense, but might have left the defendants to develop it in their answer; *certainly in that case the character of the defense would not have ousted the Court of its jurisdiction. If a cause of action is cognizable by the United States Court, the defendant cannot oust that jurisdiction by his defense to the action. He may defeat the action but he cannot destroy the jurisdiction.*"

That rule is perhaps modified as to cases arising under the Act of 1875, by section five of that Act. That portion of the section material to this inquiry is as follows: "If * * * it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought * * * that such suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, * * * the said Circuit Court shall proceed no further therein, but shall dismiss the suit."

We submit that the full power of dismissal possessed by the Court is expressed in that section.

It must appear *to the satisfaction of the Court*, that the specified grounds for dismissal exist. How can the Court be legally or properly satisfied, if it refuses, as in this case, any enlightment as to the facts? It does not appear in this case that the Court below was so satisfied, or that the order of dismissal was made upon that ground. It was made in response to a motion based on the *pleadings* only and the pleadings show that the defendants *admitted* all the jurisdictional facts and tendered an issue foreign to them, so that the question resolves itself again to this, does the fact that a defendant refuses to join issue on a federal question, oust the jurisdiction?

If that question be answered in the affirmative the best course for a defendant would be not to appear at all, as his default would be a complete admission of *all* allegations, would demonstrate that no federal question or any other was *in dispute*, and would at once oust the Court of its jurisdiction. If jurisdiction depends upon the issue made, by what authority, we ask, does a Court render judgment by default in the absence of any issue? As to all jurisdictional questions these defendants are in default. Is it possible that a mere attempt to raise a foreign issue can deprive us of the legitimate fruits of that default? We understand it to be settled that when a United States Court acquires jurisdiction by reason of a federal question, it will decide the case, though to do so, it may be necessary to dispose of questions not federal in their nature.

S. P. R. R. Co. *vs.* Cal., 118 U. S., 110.
The Mayor *vs.* Cooper, 6 Wallace, 252.

And in the late tax cases of

Santa Clara Co. *vs.* Southern Pacific R. R. Co.,
California *vs.* C. P. R. R. Co.,
California *vs.* S. P. R. R. Co., and
San Bernardino Co. *vs.* S. P. R. R. Co., 118 U. S., 304–417.

~~Where~~ the Circuit Court obtained jurisdiction on the ground that the cases arose under the Constitution of the United States, and that Court decided those constitutional questions in favor of defendant. This Court, in reviewing those decisions, finding the tax in question to be invalid under the constitution and laws of the State of California, declined to decide the federal questions involved, and instead of dismissing the cases, affirmed the judgments upon the sole ground that the constitution and laws of *California* had been violated.

These cases would seem to be conclusive authority upon the point, that when jurisdiction has attached, by reason of a *bona fide* claim of right under the constitution and laws of the United States, the *jurisdiction* of the Court will not be ousted, by reason of the fact that the Court shall finally find it unnecessary for the protection of the rights of parties, to pass upon the federal questions.

If, in this case, defendants had alleged as a defense to the action, their adverse claims to title and possession, as admitted by them to exist, and in addition had pleaded other matters of defense, those other matters of defense would not have avoided the jurisdiction. But instead of alleging their admitted claims as a defense, they in effect say to the Court: "It is true we claim this property adversely to plaintiff, and under circumstances which will necessitate the construction of laws and treaties of the United States, before our respective rights can be determined, but we do not propose to try these questions in this forum; we prefer to submit them to Judges whom we have helped to elect and may help to defeat and to a jury of our neighbors."

It seems to us very clear that the jurisdictional facts having been admitted, it was the duty of the Court to dispose of the issues presented, precisely as it would have done if the other issues involving federal questions had been presented by the answer, and that neither in this case or any other should a Court dismiss a case for want of jurisdiction; for the single reason, that a defendant endeavors to frame his pleadings so as to evade the jurisdiction; that in no case where the complaint makes a *prima facie* case of jurisdiction should the action be dismissed, except upon *evidence* which satisfies the Court that such jurisdiction does not exist.

And we understand such to be the ruling of this Court in

Hartog *vs.* Memory, 116 U. S., 591.

That was a case in which the jurisdiction was based on the citizenship of the parties, and the defendants, as in this case, made no issue as to the jurisdictional facts; but in the course of the trial defendant introduced evidence upon which, on motion, the Court dismissed the case for want of jurisdiction, and this Court, holding that the